IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 156

CLAYTON S. KRAMER, *Petitioner,*

v.

CARIBBEAN MILLS, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 9, 1964 – Plaintiff Kramer's original petition filed in U.S. District Court for Northern District of Texas, Wichita Falls Division.

Dec. 18, 1964 – Plaintiff's motion for voluntary dismissal granted and action ordered dismissed without prejudice to refiling complaint.

Dec. 18, 1964 – Order entered permitting plaintiff to file an amended complaint.

Feb. 5, 1965 – Plaintiff's first amended petition filed.

June 14, 1965 – Order entered overruling motion of defendant, Caribbean Mills, Inc., to dismiss for lack of jurisdiction over person of defendant and to quash return of service of summons.

July 1, 1965 – Defendant's original answer filed.

Sept. 2, 1965 – Order entered sustaining defendant's motion to transfer action to Dallas Division of the Northern District of Texas, on grounds of venue.

May 3, 1966 – Defendant's first amended answer filed.

May 3, 1966 – Defendant's motion to dismiss filed, asserting *inter alia* lack of jurisdiction by reason of a violation of 28 U.S.C. § 1359.

May 20, 1966 – Order entered overruling defendant's motion to dismiss.

May 25, 1966 – Jury trial of action commenced.

May 27, 1966 – Court's charge to the jury, and verdict of the jury in favor of the plaintiff.

July 6, 1966 – Judgment of District Court entered, awarding plaintiff judgment in the sum of $165,000, plus interest and costs.

July 15, 1966 – Defendant's notice of appeal filed.

Jan. 26, 1968 – Opinion and judgment of the Court of Appeals for the Fifth Circuit.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

CLAYTON S. KRAMER,
Plaintiff

v.

CARIBBEAN MILLS, INC.,
Defendant

C.A. No. 3-1168

PLAINTIFF'S FIRST AMENDED PETITION

Filed Feb. 9, 1965.

To the Honorable Judge of said Court:

Now comes Clayton S. Kramer, hereinafter called Plaintiff, complaining of Caribbean Mills, Inc., hereinafter called Defendant, and with leave of Court first had and obtained, files this his first amended complaint, and for cause of action would show unto the Court and jury as follows.

I.

Clayton S. Kramer is a citizen and resident of the State of Texas and lives and resides in Wichita Falls, Wichita County, Texas, which is in the Wichita Falls Division of the United States District Court for the Northern District of Texas.

Caribbean Mills, Inc. is a foreign corporation organized and existing under the laws of the country of Haiti. It has a place of business in Dallas, Texas, and it may be served with citation herein by serving its vice president, Walter M. Spradley, at the office of Jenkens, Anson, Spradley & Gilchrist at 1201 Main Street, Dallas, Texas.

II.

This is a suit for debt brought by the Plaintiff as against the Defendant herein arising out of contracts in writing dated on or about June 4, 1959.

On or about said date Caribbean Mills, Inc. executed a certain agreement with one Roy B. Kelly of Washington, D. C., and Panama and Venezuela Finance Company, a Panamanian corporation, whereby Roy B. Kelly and Panama and Venezuela Finance Company agreed to deliver to Caribbean Mills, Inc. certain shares of stock held by them which constituted obligations of Caribbean Mills, Inc., to the said Caribbean Mills, Inc., and to relinquish to the said Caribbean Mills, Inc. a continued "economic interests" in the assets of said Caribbean Mills, Inc.

Caribbean Mills, Inc., in turn, agreed to pay Roy B. Kelly and Panama and Venezuela Finance Company at such place as they jointly should designate, the sum of Two Hundred Fifty Thousand and No/100 Dollars ($250,000.00). Eighty-Five Thousand and No/100 Dollars ($85,000.00), of the Two Hundred Fifty Thousand and No/100 Dollars ($250,000.00) consideration, agreed to be paid was paid by the Defendant at the time of the closing of such agreement. The balance of One Hundred Sixty-Five Thousand and No/100 Dollars ($165,000.00) was to be paid in twelve (12) annual installments in the amount of Thirteen Thousand Sev-

en Hundred Fifty Dollars and No/100 Dollars ($13,750.00) each, the first of such installments to be due and payable on June 1, 1962, and a like installment to be due and payable on June 1 each year thereafter until the full sum of One Hundred Sixty-Five Thousand and No/100 Dollars ($165,000.00) had been paid.

All rights of Roy B. Kelly in and under said agreements have been transferred and conveyed to Panama and Venezuela Finance Company which in turn has assigned, sold, and delivered its entire interest and rights in said agreement to Clayton S. Kramer, the Plaintiff herein, who is the legal owner and holder of such agreement. Acting by and under the authority of the agreements above described, Panama and Venezuela Finance Company, Roy B. Kelly, and Clayton S. Kramer have designated a place of payment of such obligations to be at the office of Clayton S. Kramer in the First-Wichita National Bank Building in the City of Wichita Falls, Wichita County, Texas.

Although Panama and Venezuela Finance Company and Roy B. Kelly fully executed and complied with their portion of the above described agreement, the Defendant has failed and refused to pay any of the remaining installments, totaling One Hundred Sixty-Five Thousand and No/100 Dollars ($165,000.00) and have denied all liability therefor, thus constituting and making complete breach of said agreement and causing all of the obligations thereunder to become immediately due and payable.

III.

Plaintiff would further show unto the Court that the Defendant was and/or is doing business in the State of Texas at the time this cause of action arose, in the

interim period, and at the present time; that its principal officers reside in the State of Texas; that its business is carried on and supervised in the State of Texas; and that therefore this Court has jurisdiction over this foreign Defendant.

Wherefore, Premises Considered, Plaintiff prays that Defendant be cited and answer herein as required by law and that upon final hearing hereof Plaintiff do have and recover judgment against said Defendant in the sum of One Hundred Sixty-Five Thousand and No/100 Dollars ($165,000.00), together with interest thereon at the rate of Ten Per Cent (10%) from and after June 1, 1962; for costs of Court; and for such other and further relief, in law or in equity, to which they may show themselves justly entitled.

MOCK, BANNER &
McINTOSH,
By C. COIT MOCK,
(C. Coit Mock),
Attorneys for the Plaintiff.

1310 Ninth Street,
Wichita Falls, Texas.

DEFENDANT'S FIRST AMENDED ANSWER

Filed May 3, 1966.

[Caption Omitted in Printing]

To the Honorable Judge of said Court:

Comes Now Caribbean Mills, Inc., Defendant in the above entitled and numbered cause, and with leave of the Court files its First Amended Answer and would respectfully show to the Court:

First Defense.

Plaintiff's First Amended Petition fails to state a claim against the Defendant upon which relief can be granted.

Second Defense.

This Court lacks jurisdiction over the person of the Defendant.

Third Defense.

This Court lacks jurisdiction in the above entitled and numbered cause, in that Clayton S. Kramer is not the real party in interest, and by virtue of a purported assignment, Clayton S. Kramer has been improperly or collusively made Plaintiff in this cause to invoke the diversity jurisdiction of this Court, which would not otherwise be present.

Fourth Defense.

In the alternative, Defendant alleges that Plaintiff is precluded and incapacitated from maintaining the above entitled and numbered cause in that his purported assignor, Panama and Venezuela Finance Company has been transacting and doing business in the State of Texas and has not filed an instrument

with the Secretary of State of Texas designating an agent for service in the State of Texas, nor has Panama and Venezuela Finance Company obtained a certificate of authority to do business within the State of Texas.

Fifth Defense.

With respect to the allegations of the Amended Complaint called "Plaintiff's First Amended Petition," Defendant pleads as follows:

1. With respect to the allegations in Paragraph I, Defendant admits that Caribbean Mills, Inc., is a foreign corporation organized and existing under the laws of the country of Haiti, denies that it has a place of business in Dallas, Texas, and that it may be served with citation herein by serving its Vice President, Walter M. Spradley, at the office of Jenkens, Anson, Spradley & Gilchrist at 1201 Main Street, Dallas, Texas, and is without knowledge or information sufficient to form a belief as to the truth of all other allegations in said Paragraph and such allegations are therefore denied.

2. With respect to the allegations in Paragraph II, Defendant admits that on or about May 30, 1959, Caribbean Mills, Inc., executed a written agreement with Roy B. Kelly of Washington, D. C. and Panama-Venezuela Finance Company, a Panamanian corporation, but Defendant states that the allegations of said Paragraph II do not set forth the referred to agreement and Defendant denies all allegations in said Paragraph II which are inconsistent with the terms and provisions of said agreement or which purport to state less than all of the terms and provisions of said agreement; and, Defendant denies all other allegations contained in said Paragraph II.

3. Defendant denies the allegations of Paragraph III.

Sixth Defense.

Defendant has acquired all of Roy B. Kelly's right, title and interest in, to and under the May 30, 1959, Agreement, and the Defendant has acquired the right to all sums due and payable, or to become due and payable under said Agreement.

Seventh Defense.

Defendant has already fulfilled all of its obligations to Panama and Venezuela Finance Company and Roy B. Kelly under the May 30, 1959, Agreement, and has no obligation to make any further payments or payment to plaintiff, or any other party or parties under said Agreement.

Eighth Defense.

Plaintiff is now estopped from asserting any claim or right under the May 30, 1959 Agreement, in that prior to the time any installment payments were due under said Agreement Panama and Venezuela Finance Company, who had knowledge of the facts, represented to the Defendant, with the intention that said representations be acted upon, that Panama and Venezuela Finance Company had no further interest in or right to any further payments under the May 30, 1959, Agreement, and Defendant, who had no knowledge of the facts, or the means of obtaining knowledge, relied upon these false representations or concealment of material facts to its prejudice.

Ninth Defense.

In the alternative Defendant alleges that Panama and Venezuela Finance Company, who had knowledge

of its rights, voluntarily relinquished and waived any right which they might have had under the May 30, 1959 Agreement, by representing to the Defendant, who relied upon the representations that Panama and Venezuela Finance Company claimed no further interest in or right to any further payments under the said Agreement.

Wherefore, Premises Considered, Defendants prays that the relief prayed for by Plaintiff be denied, that the Plaintiff have and recover nothing of and from the Defendant, and that the Defendant go hence without day and with its costs.

RAIN, HARRELL & EMERY,
MORRIS HARRELL,
(Morris Harrell),
STAN McMURRY,
(Stan McMurry),
Attorneys for Defendant
Caribbean Mills, Inc.

4200 Republic National Bank Tower,
Dallas, Texas.

DEFENDANT'S MOTION TO DISMISS

Filed May 3, 1966.

[Caption Omitted in Printing]

To the Honorable Judge of said Court:

Now comes Caribbean Mills, Inc., Defendant in the above entitled and numbered cause, and moves the Court as follows:

1. To dismiss this action on the ground that this Court lacks jurisdiction over the person of the Defendant.

2. To dismiss this action or in lieu thereof to quash the return of service of summons herein on the grounds that his Defendant is a foreign corporation organized and existing under the laws of the country of Haiti and was not and is not subject to service of process in the Northern District of Texas and this Defendant has not been properly served with process herein.

3. To dismiss the action for lack of jurisdiction over the subject matter for the reason that by virtue of a purported assignment, Clayton S. Kramer was improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court, which would not otherwise be present, in violation of Section 1359, Title 28, United States Code.

4. To dismiss the action for lack of jurisdiction over the subject matter for the reason that this action is being prosecuted in the name of Clayton S.

Kramer who is not the real party in interest, in violation of Rule 17(a) of the Federal Rules of Civil Procedure.

5. In the event that the Court should hold that this Court has jurisdiction over the subject matter and over the person of the Defendant and that the Defendant has been properly served, then Defendant moves to dismiss the action for the reason that, as shown by the attached certificate of the Secretary of State of Texas, Plaintiff is precluded and incapacitated from maintaining the above entitled and numbered cause in that his purported assignor, Panama and Venezuela Finance Company has been transacting and doing business in the State of Texas and has not filed an instrument with the Secretary of State of Texas designating an agent for service in the State of Texas, nor has Panama and Venezuela Finance Company obtained a certificate of Authority to do business within the State of Texas.

Defendant prays that this motion be sustained and that the action be dismissed.

RAIN, HARRELL & EMERY,
MORRIS HARRELL,
(Morris Harrell),
STAN McMURRY,
(Stan McMurry),
Attorneys for Defendant
Caribbean Mills, Inc.
4200 Republic National Bank Tower,
Dallas, Texas.

ORDER

Filed Jul. 6, 1966.

[Caption Omitted in Printing]

On the 20th day of May, 1966, came on for hearing in the above entitled and numbered cause, Defendant's Motion to Dismiss, and the Court having considered said Motion and the arguments of counsel and the depositions of the Plaintiff, and being of the opinion that the Defendant's Motion to Dismiss the Action for the reason that Clayton S. Kramer was improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court, should be overruled, in that the assignment from Panama and Venezuela Finance Company to Clayton S. Kramer was good on its face, and being further of the op nion that the other grounds set forth in said Motion to Dismiss should be overruled.

It is therefore Ordered, Adjudged, And Decreed that the Defendant's Motion to Dismsis be, and the same is hereby overruled, to which action of the Court Defendant excepts.

Entered this 20 day of May, 1966.

SARAH T. HUGHES,
United States District Judge.

PLAINTIFF'S EXHIBIT NO. 4

Assignment of Sept. 21, 1964

Know All Men By These Presents:

That we, the undersigned Panama and Venezuela Finance Company, a Panamanian Corporation, for and in consideration of One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, does hereby assign, sell and convey to Clayton S. Kramer of Wichita Falls, Wichita County, Texas, all of our right, title and interest, including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, monies due and/or to become due, arising from or out of a certain agreement and contract in writing, dated June 4, 1959, between Caribbean Mills, Inc., a Haitian Corporation, Roy B. Kelly of Washington, D.C. and Panama and Venezuela Finance Company, under which contract or agreement Caribbean Mills agreed to pay to Panama and Venezuela Finance Company and/or Roy B. Kelly the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) on such terms and at such times as were more fully set out in said instrument, a copy of which is attached hereto as Exhibit A, and fully incorporated herein by reference. This assignment specifically includes another certain agreement, made in connection with the original agreement heretofore described, such other agreement being a collateral agreement and contract of Murchison Brothers and others, dated on or about June 4, 1959, a copy of such agreement is also attached hereto as Exhibit B, and fully incorporated herein by reference.

Panama and Venezuela Finance Company warrants to Assignee herein that it is the owner of and entitled to all benefits arising by virtue of the agreements and/or contracts herein assigned and has the right to make this assignment of the same.

It is agreed that this assignment to the said Clayton S. Kramer is made under the laws of the State of Texas, and in the event that there is any question of validity of such assignment, it shall be construed and governed by the laws of the State of Texas, and the powers, duties and benefits flowing hereunder to the said Clayton S. Kramer shall be controlled by the laws of the State of Texas.

That I, the undersigned officer of Panama and Venezuela Finance Company am specifically authorized and empowered to make such assignments to Clayton S. Kramer and such contract for Panama and Venezuela Finance Company herein.

Made and executed on this the 21st day of Sept., A.D. 1964.

PANAMA AND VENEZUELA
FINANCE COMPANY,
By E. ALFARO.

DEFENDANT'S EXHIBIT NO. 1

Agreement of Sept. 21, 1964

STATE OF TEXAS
COUNTY OF WICHITA:

KNOW ALL MEN BY THESE PRESENTS: That we, Panama and Venezuela Finance Company, a Panamanian corporation, and Clayton S. Kramer, do hereby agree and contract as follows:

WHEREAS, previously the Panama and Venezuela Finance Company, for valuable consideration, by instrument in writing, irrevocably assigned, sold and conveyed to Clayton S. Kramer all of its right, title and interest under and arising out of a certain contract or agreement closed June 4, 1959, between Panama and Venezuela Finance Company, Caribbean Mills, Inc., and Roy B. Kelly, together with an assignment of a connected agreement dated on or about June 4, 1959, from Murchison Brothers and others; and,

WHEREAS, the said Clayton S. Kramer is now the sole owner of any action of causes of action derivative therefrom, with the independent right of management, control and prosecution thereof, and does hereby indemnify and hold harmless the Panama and Venezuela Finance Company from any cost or expense that has or may arise out of the prosecution of any demand or suit on said contracts; and,

WHEREAS, the said Clayton S. Kramer agreed to make demand on said contracts and collect or prosecute to final Judgment all claims thereon; it is hereby collaterally Agreed, that in the event of payment to or recovery on said contracts by Clayton S. Kramer, he will pay solely as a Bonus to Panama and Venezuela Finance Company, or anyone properly designated by it in writing, a sum equal to 95 per cent of the net proceeds or monies obtained from Caribbean Mills, Inc., or others, under or by virtue of the

contracts heretofore assigned to the said Clayton S. Kramer, it being understood by the parties hereto, that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such attorneys an amount not to exceed thirty-three and one-third per cent (33 1/3%) of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half (1/2) the total of such expenses. In other words, after the payment of attorney fees and expenses, Clayton S. Kramer is to pay to Panama and Venezuela Finance Company or its order, ninety-five (95) per cent of the remainder of the net recovery, if any, and retain five (5) per cent for his own use and benefit.

This contract and agreement by and between the parties hereto is made and is to be performed in the State of Texas; that the same was drawn by the parties with reference to the laws of the State of Texas, and it is hereby specifically contracted and agreed that in the event of any controversy, dispute or litigation relating to or arising out of this instrument, the laws of the State of Texas specifically control. In consideration of our mutual promise and consideration with which this instrument passes, we set our hands hereunto on this the 21st day of Sept. A.D. 1964.

/s/ Clayton S. Kramer
Clayton S. Kramer

PANAMA & VENEZUELA
FINANCE COMPANY

DEFENDANT'S EXHIBIT NO. 2

EDUARDO ALFARO
ABOGADO P.O. Box 951
PANAMA, R. DE P.

AVE. CUBA Y CALLE 33
EDIFICIO PONCE - OFICINA 12
APARTADO 951
TELEFONOS: 5-1213 - 5-1214

DIRECCION CABLEGRAFICA
ORAFLA – PANAMA

REGISTERED

September 23, 1964

C. Coit Mock, Esq.
Mock, Banner & McIntosh
1310 Ninth Street
Wichita Falls, Texas, U.S.A.

Dear Mr. Mock:

Enclosed herewith one copy of the Agreement and one copy of the Assignment, both in reference to the rights of Panama and Venezuela Finance Company, in the matter of Caribbean Mills, Inc.

Please acknowledge receipt.

Yours truly,

/s/ Eduardo Alfaro

EA:emd.

Encl. (Dictated but not read)

DEFENDANT'S EXHIBIT NO. 3

STATE OF TEXAS

COUNTY OF WICHITA:

KNOW ALL MEN BY THESE PRESENTS:

That I, Clayton S. Kramer, of Wichita Falls, Texas, hereinafter called Client, and MOCK, BANNER & McINTOSH, a partnership composed of C. Coit Mock, Jack G. Banner, and Ed McIntosh, hereinafter called Attorney, duly licensed and practicing attorneys of Wichita Falls, Texas, do hereby make the following contract and agreement:

WHEREAS, Client is the owner and holder, as assignee from Panama and Venezuela Finance Company, of all of the rights and interests arising out of a certain agreement and contract in writing, dated June 4, 1959, between Caribbean Mills, Inc., a Haitian corporation, Roy B. Kelley of Washington, D.C., and Panama and Venezuela Finance Company, under which contract or agreement Caribbean Mills agreed to pay to Panama and Venezuela Finance Company and/or Roy B. Kelley the sum of Two Hundred Fifty Thousand Dollars ($250,000), on such terms and at such times as were more fully set out in said instrument; and WHEREAS Panama and Venezuela Finance Company was the sole owner of the rights arising under said contract; and WHEREAS Panama and Venezuela Finance Company has assigned its entire cause of action to Client herein; and WHEREAS Caribbean Mills, Inc. and/or their successors have defaulted and/or refused to comply with the terms of said agreement; and WHEREAS it is the desire of the Client herein to obtain the services of said attorneys to represent him in the collection of any and all claims accruing under said contract, against each and every person responsible therefor, Client hereby employs and confirms the previous employment of said attorneys to prosecute said claim. This contract is on the following terms and conditions:

1. Client agrees to pay said attorneys One-Third (1/3) of the total recovery to him, as compensation for their services

in connection therewith, and hereby assigns and conveys to said attorneys One-Third (1/3) of any and all recovery obtained in his behalf whether by judgment, settlement or otherwise.

2. Client hereby agrees to reimburse said attorneys for any and all actual expenses other than ordinary office expenses and agree that said expenses may be deducted from the recovery in the said premises.

3. It shall be the exclusive privilege of the attorneys herein named to determine whether or not an appeal shall be made from any judgment, favorable or unfavorable, which shall arise from the trial of a lawsuit in connection with, the above claim.

4. We, and each of us, agree that no compromise, settlement, or proposal of compromise or settlement, on the above claims, shall be made without the consent of the others.

WITNESS our hands at Wichita Falls, Texas, on this 10th day of October, A.D. 1964.

/s/ Clayton S. Kramer
CLIENT

/s/ Jack Banner
FOR MOCK, BANNER & McINTOSH
ATTORNEYS

DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO ANSWER QUESTIONS PROPOUNDED TO HIM DURING DEPOSITION

Filed Feb. 7, 1966.

[Caption Omitted in Printing]

Comes Now, the Defendant, Caribbean Mills, Inc., and pursuant to Rule 37a of the Federal Rules of Civil procedure moves the Court for an Order Compelling the Plaintiff, Clayton S. Kramer, to answer certain questions propounded to him during the course of his examination by deposition, on the following grounds:

I.

The deposition of the Plaintiff, Clayton S. Kramer, a copy of which is attached hereto and made a part hereof as "Exhibit A" was taken at Dallas, Texas, by the Defendant, Caribbean Mills, Inc., on October 15, 1965, before Odell Oliver, a Notary Public in and for Dallas County, Texas.

II.

This deposition was taken pursuant to and in compliance with the agreement of the parties as set forth on Page 2 of said deposition.

III.

That during the course of this examination by deposition, Plaintiff, Clayton S. Kramer, upon the advice of his counsel, refused to answer the following questions:

(a) "Q. (By Mr. Harrell) What was your arrangement or agreement for the acquisition of this claim?" (Deposition, Page 27, Lines 16-17.)

(b) "Q. What did you pay for it?" (Deposition, Page 29, Line 10.) [The claim against Caribbean Mills, Inc.]

(c) "Q. What financial arrangments did you make for obtaining this assignment from Panama and Venezuela Finance Company?" (Deposition, Page 29, Lines 17, 18 and 19.)

(d) "Q. (By Mr. Harrell) Did you make any cash payment Mr. Kramer, in connection with the assignment to you?" (Deposition, Page 29, Line 25, Page 30, Lines 1 and 2.)

(e) "Q. (By Mr. Harrell) Mr. Kramer, did you take a promissory note to Panama and Venezuela Finance Company for the acquisition of this claim? (Deposition Page 32, Lines 17, 18 and 19.)

(f) "Q. (By Mr. Harrell) Mr. Kramer, did you borrow any money in connection with obtaining this claim by assignment?" (Deposition Page 33, Lines 6, 7 and 8.)

(g) "Q. (By Mr. Harrell) Mr. Kramer, if you borrowed any money for the purpose of acquiring this assignment, is there any party other than yourself liable on the debt?" (Deposition, Page 33, Lines 15, 16, 17 and 18.)

(h) "Q. The assignment marked Kramer Deposition Exhibit No. 1, recites a consideration of one dollar and other good and valuable consideration, what is the other good and valuable consideration referred to in this assignment, Mr. Kramer?" (Depo-

sition, Page 36, Lines, 5, 6, 7, 8 and 9.)

(i) "Q. Without inquiring as to the nature of it do I understand then that you have had other business arrangements with Panama and Venezuela Finance Company?

"A. Yes.

"Q. I'm going to ask you what they were?"

(j) "Q. Mr. Kramer, did you have any conversations with respect to the consideration for the assignment of this claim which you assert?" (Deposition Page 52, Lines 11, 12 and 13.)

(k) "Q. Do the other agreements that you have with Panama and Venezuela Finance Company have to do with payment for this assignment of the claim which you have acquired? (Deposition, Page 55, Lines 2, 3, 4, and 5.)

IV.

That the above questions inquire into matters that are not privileged and which are relevant to the subject matter involved in the pending matter.

Wherefore, Defendant, Caribbean Mills, Inc. prays that this Court order the Plaintiff, Clayton S. Kramer, to answer the aforementioned questions and questions which are related thereto, and for such other and further relief as the Court may deem just.

RAIN, HARRELL & EMERY,
MORRIS HARRELL,
(Morris Harrell),
Attorneys for Defendant,
Carribbean Mills, Inc.

42 Floor Republic Bank Tower,
Dallas, Texas.

TESTIMONY OF CLAYTON S. KRAMER

Filed Sep. 22, 1966.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

Clayton S. Kramer,
vs. CA No. 3-1168.
Caribbean Mills, Inc.

Be It Remembered that on the 25th day of May 1966 before the Honorable Sarah T. Hughes, United States District Judge, and a Jury, at Dallas, Texas, the following proceedings were had in the above styled and numbered cause:

Appearances:

Mock, Banner & McIntosh, Wichita Falls, Texas, By: Mr. Jack Banner, For the Plaintiff.

Rain, Harrell and Emery, Dallas, Texas, By: Mr. Morris Harrell, Mr. Stan McMurry, For the Defendant.

[3]

Dallas, Texas
May 25, 1966
Wednesday, 2:00 p.m.

Proceedings.

[57]

* * *

CLAYTON S. KRAMER, having been called as a witness on behalf of the Plaintiff,, being first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. Banner:

Q. State your name, please.

A. Clayton Kramer.

Q. And where do you live, please?
A. In Wichita Falls, Texas.
Q. And what is your occupation or profession?
A. I am an attorney.

The Court:
A little louder, Mr. Kramer, if you will, please.

The Witness Kramer:
All right, ma'am.

(By Mr. Banner):
Q. How long have you been licensed to practice law?
A. Since 1954.
Q. Are you duly licensed by the State of Texas and is your license to practice law properly on file [58] with the Supreme Court of the State of Texas?
A. Yes, it is.
Q. Mr. Kramer, I will ask you to state whether or not you acquired a certain assignment which has heretofore been marked Plaintiff's Exhibit 4, from the Panama and Venezuela Finance Company?
A. Yes.
Q. And is this the same instrument or the same assignment that was physically delivered to you?
A. Yes, it is.
Q. I will ask you to tell the Court and Jury whether or not you accepted such assignment from the Panama-Venezuela Finance Company?
A. Yes, I certainly did.
Q. I will ask you to tell the Ladies and Gentlemen of this Jury whether or not consideration was paid for such assignment?

Mr. Harrell:

We object to that question, Your Honor, as calling for a conclusion of this witness. He can state what he paid for it if he wishes.

The Court:

The instrument, I think, speaks for itself.

Mr. Banner:

Very well, Your Honor.

The Court:

I will sustain the objection.

[59] (By Mr. Banner):

Q. I ask you to look at the assignment and the contract marked or the agreement marked Exhibit A, attached to the back thereof—are you familiar with that agreement?

A. Yes, I am.

Q. Who is that agreement between?

A. The agreement is between Panama and Venezuela Finance Company, Roy B. Kelly and Caribbean Mills, Incorporated.

Q. Mr. Kramer, would you look at that for a few moments there and tell the Ladies and Gentlemen of this Jury whether or not the agreement attached to the assignment which you received is the same agreement or a copy of the same agreement that has been previously marked as Plaintiff's Exhibit 1?

Mr. Harrell:

Your Honor, the instrument speaks for itself and both have been marked.

The Court:

I sustain the objection.

(By Mr. Banner):

Q. Following the receipt of the assignment, I will ask you to state whether or not you made demand of the Caribbean Mills, Inc., of payment of the annual installment in the sum of $13,750, totalling $165,000 as provided for in the agreement marked Exhibit A?

A. I did not.

[60] Mr. Harrell:

We object to that question. It contains an interpretation of counsel as to what it provided.

The Court:

I sustain the objection.

(By Mr. Banner):

Q. Mr. Kramer, did you ever make any demand of Caribbean Mills on the contract marked Plaintiff's Exhibit 1?

A. Yes.

Q. Was any payment ever made to you by Caribbean Mills following such demand?

A. No—following that demand no payment was ever made to me by Caribbean Mills.

Q. I'll ask you to state whether or not following such demand anything of value was received by you on the contract marked Plaintiff's Exhibit 1?

A. No—following this demand through my attorneys nothing of any value was received.

The Court:

Will you talk a little louder?

The Witness Kramer:

Following this demand through my attorneys nothing of value was ever received on this contract.

(By Mr. Banner):

Q. Are you the same Clayton S. Kramer who has brought this present action against Caribbean Mills, Inc.?

A. Yes, I am.

[61] Q. I'll ask you to state whether or not you authorized the filing of such suit?

A. Yes, I did.

Q. I'll ask you to state whether or not the subject matter of such suit is the payment of $165,000 called for in the contract marked Plaintiff's Exhibit 1?

Mr. Harrell:

We object to that question—the subject matter of the suit is a matter of record here.

The Court:

I sustain the objection.

Mr. Banner:

Very well, Your Honor.

(By Mr. Banner):

Q. Mr. Kramer, I show you an instrument filed of record the 9th day of February, '65, styled Clayton S. Kramer versus Caribbean Mills, Incorporated, entitled "The Plaintiff First Amended Petition" and ask

you to look at that and state whether or not that sets forth your cause of action herein.

Mr. Harrell:

We object to that, Your Honor, it calls for a conclusion of the witness.

The Court:

I sustain the objection.

Mr. Banner:

Very well, Your Honor, we will offer as the best evidence the Plaintiff's First Amended Petition herein.

Mr. Harrell:

We object to that, Your Honor, [62] it is a part of the Court record.

The Court:

I sustain the objection.

Mr. Banner:

Note our exception.

(By Mr. Banner):

Q. Following the filing of this suit, Mr. Kramer, have you received any annual installment payments as called for in the contract marked Plaintiff's Exhibit 1?

A. No, sir.

Mr. Harrell:

We object to that also as an interpretation by the Plaintiff's counsel.

The Court:

I sustain the objection.

(By Mr. Banner):

Q. I'll ask you to state whether or not following the filing of this suit you have received anything of value on the agreement in question, or from Carribean Mills—period?

A. No.

Q. I'll ask you to state whether or not you have entered into any written contract or agreement with Caribbean Mills after the filing of this suit?

A. No.

Q. I'll ask you to state whether or not you have executed any release or waiver of claim that you might possess against Caribbean Mills, Inc., since the filing of this suit?

Mr. Harrell:

Your Honor, I believe that is [63] immaterial and irrelevant.

The Court:

I'll overrule the objection.

A. No, I have not,—no.

(By Mr. Banner):

Q. I'll ask you to state whether or not you have entered into any contract or agreement whatsoever waiving or abrogating any payment to you by Caribbean Mills, Inc.?

A. No, sir.

Mr. Banner:

Pass the witness.

CROSS EXAMINATION

By Mr. Harrell:

Q. Mr. Kramer, you are an attorney in the City of Wichita Falls, Texas?

A. Yes.

Q. Is your principal business the practice of law?

A. Yes.

Q. I'll ask you, Mr. Kramer, how you acquired the assignment which has been marked here, I believe, as Plaintiff's Exhibit No. 1—how did you physically acquire it?

A. I physically acquired it attached to Exhibit B of Plaintiff's Exhibit 4.

Q. You acquired then a copy?

A. Yes—I acquired a copy at that time—the [64] original or this duplicate original about the same time. As to how I acquired them—I acquired them from Mr. Banner.

Q. Were these assignments—was this assignment accompanied by any letter or communication?

A. Yes—Plaintiff's Exhibit 4—when it was received at my attorney's office was accompanied by a letter of transmittal.

Q. Was that letter then transmitted on to you?

A. A copy of it was.

Mr. Harrell:

Your Honor, may I approach the bench with Mr. Banner?

The Court:

Yes.

(At this time there was a conference at the Bench with between Counsel Harrell and Counsel Banner and the Court off the record and out of the hearing of the Jury and the Court reporter.)

(By Mr. Harrell):

Q. This letter which transmitted this assignment then was received by Mr. Banner, a copy, of which was furnished to you, Mr. Kramer, is that correct?

A. It was furnished me by Mr. Banner. I believe the letter was addressed to his partner, Mr. Mock.

Q. I understood you to say, Mr. Kramer, you were familiar with this agreement which has been marked here [65] as Plaintiff's Exhibit 1, and I am talking about the agreement of May 30, 1959—was that your testimony, sir?

A. I was familiar with the terms of this agreement. Whether I had actually laid eyes on this original or duplicate original—I don't know.

Q. Were you a party to this agreement, Mr. Kramer?

A. The May 30, 1959?

Q. Yes.

A. No. sir—of course not—no.

Q. Have you ever represented the Panama and Venezuela Finance Company as an attorney?

A. No, sir.

Q. Have you represented any of the other original parties to this agreement, marked Plaintiff's Exhibit 1?

A. No, sir.

Q. When did you first learn of this agreement marked Plaintiff's Exhibit 1, Mr. Kramer?

A. I cannot tell you exactly when I learned of the agreement. I can tell you when I learned of the contents—the terms—the substance of the agreement—that was in the summer of 1964—the early summer.

Q. The agreement of course being dated May 29 or [66] May 30th of 1959, is that correct?

A. Yes.

Q. I understood you to say in answer to a question that was asked by Mr. Banner that you made demand on the agreement—how did you do that, Mr. Kramer?

A. I authorized Mr. Banner to make demand, formal demand on this agreement.

Q. And whatever demand was made, was one made by Mr. Banner after—at your direction?

A. That's correct.

Q. But not by you, is that correct?

A. That's right.

Mr. Harrell:

Your Honor please, I want to ask this witness some further questions at this time, if I may, pertaining to this total transaction?

The Court:

Do you have any questions other than that to ask this witness?

Mr. Harrell:

I believe no further questions with respect to his direct examination.

The Court:

I'm going to excuse the Jury and ask you to come back at 9:00 o'clock in the morning, because these other matters are to be taken up outside the presence of the Jury, so you may be excused at this time.

[67] (At this time the Jury left the Courtroom—4:04 p.m., and the proceedings continued as follows):

Mr. Harrell:

If Your Honor please, the Court has indicated that there would be no summation to the Jury of any issue with respect to the Defendant's defense that Mr. Kramer was made the Plaintiff in this suit collusively and improperly to invoke the Court's jurisdiction or to what the Defendant believes to be the obligation and burden of the Plaintiff to prove that such is not the case, and we therefore would like to further interrogate Mr. Kramer out of the presence of the Jury in accordance with Her Honor's ruling on this matter.

The Court:

You may do so.

Mr. Harrell:

I am saying to Your Honor, that we request that each of the questions that I will ask and the answers given be submitted to the Jury and that the questioning take place in the presence of the Jury and preserving that point, if we may, Your Honor.

The Court:

You may and you may proceed.

(By Mr. Harrell):

Q. Mr. Kramer, prior to your first learning of this contract which has been marked [68] Plaintiff's Exhibit 1, had you had any conversations with any representative of Panama-Venezuela Finance Company?

A. No.

Q. Had you had any conversation with Mr. Roy Cohn or anyone with the law firm in New York City that he is connected with?

A. No, sir.

Q. Then is it your testimony that the first time that you heard of this contract was from Mr. Banner?

A. That's correct.

Q. Now, state the circumstances of your being advised of the existence of this contract.

A. As well as I can recall it was in the early part of the summer of 1964, and I was talking to Mr. Banner, as we frequently did and still do, and he brought the subject up. Now, he didn't bring up the subject of this specific contract, he brought up the subject of the claim and the fact that there might be a claim that could be acquired.

Q. Did he tell you that he was doing some briefing in connection with the claim?

A. I think—in connection with the claim—no, sir. I don't believe he did.

Q. Did he tell you he was doing some briefing in [69] connection with this contract?

A. I could see he was doing some briefing.

Q. Did he tell you that, Mr. Kramer?

A. No—not that I recall.

Q. How did vou know that he was then doing some briefing?

A. Well, I do it myself and I know what it looks like.

Q. Were you in Mr. Banner's office then?

A. Yes, I'm sure I was then.

Q. At a time when he was engaged in briefing some point in connection with this contract marked Plaintiff's Exhibit 1?

A. I don't know whether it was in connection with it or not.

Q. Did he tell you that Mr. Cohn had asked him to do some briefing in connection with this matter?

A. No, sir, he did not.

Q. Did you later find out that that was the case?

A. No, sir.

Q. Did he tell you subsequently that he was briefing a legal point in connection with this matter at the request of Mr. Roy Cohn?

A. No, sir.

[70] Q. Or of the law firm that Mr. Cohn is connected with?

A. No, sir.

Q. Did he tell you that it might be possible for someone to acquire this claim and make some money on it?

A. Yes, sir.

Q. And did you say that you were interested in acquiring it for that purpose?

A. I certainly did.

Q. What did he tell you, that is, Mr. Banner?

A. Well, all our conversations didn't occur—just one conversation and then bang—we went into things and conversations occurred over a period of several months.

Q. All right, will you tell me what Mr. Banner said on the first conversation he had with you in connection with this matter?

A. I couldn't tell you what he said on the first conversation, Mr. Harrell, I couldn't.

Q. But he did tell you he was briefing a legal point involving a cause of action for a claim on which if prosecuted or enforced might result in profit for anybody that prosecuted it, isn't that right?

A. That may be right. I am not saying that it [71] isn't. He told me that he was briefing—at that time on this point—I'm not sure what he was doing. He told me he was doing some briefing, and as I recall he mentioned at some time or other that he was doing some briefing.

Q. Did you later learn that this claim Mr. Banner was talking about was a claim under this contract between Panama-Venezuela Finance Company, Roy Kelly, and Caribbean Mills, Inc.?

A. I think that's right.

Q. Did you learn that from Mr. Banner?

A. Pardon me—I'm not sure I understood your question just before this one?

Q. I say—did you learn that the claim that Mr. Banner was speaking to you about was a claim that was predicated upon this contract which has been marked Plaintiff's Exhibit 1?

A. Yes—yes.

Q. Did Mr. Banner tell you that?

A. Yes.

Q. Did you tell him that you were interested in acquiring the claim?

A. Yes, sir.

Q. Did you know whether or not that had been—there had been any payments made on the contract with [72] respect to the $165,000 at the time that you acquired the claim?

A. At the time I acquired the claim, to the best of my knowledge, I knew that no payments had been made—it was at the time of the assignment.

Q. You knew that no payments had been made, is that correct?

A. I was satisfied that no payments had been made.

Q. And at the time that you talked with Mr. Banner about the claim, you knew that none of the installment payments of $165,000 total had been made, is that right?

A. That's correct, but on the first conversation, I'm not sure that I knew that. I doubt if I did on our first conversation. By the time I took the assignment on September 21, 1964—yes—I knew as much as I needed to know about the fact that those installments had not been paid.

Q. Mr. Kramer, did Mr. Banner tell you how he had knowledge of this contract?

A. No, sir, I don't believe he did.

Q. Did he tell you he had talked with Mr. Roy Cohn about this contract?

A. No, sir, I don't believe that he told me that.

[73] Q. And you didn't ask him how he knew of the existence of the contract?

A. No, sir.

Q. Did you tell Mr. Banner that you wanted to acquire the claim?

A. Yes—again, I first told him I was interested and would he look into it, and later I told him "Yes, I would like to acquire the claim."

Q. Do you know what Mr. Banner did in connection with your acquisition of the claim?

A. I know he carried out some investigation and some negotiation.

Q. Did he tell you who he talked to in connection with your possible acquisition of this claim?

A. I don't believe he did at that time.

Q. Did he at any time, Mr. Kramer, tell you who he had talked to in connection with your acquisition of the claim?

A. Mr. Harrell, I'm not sure he told me who he talked to in connection with my acquisition of the claim. I do know—I just don't know if he ever told me who he did talk to. It didn't matter to me who he talked to.

Q. I'm not asking you whether it mattered to you, I'm asking you if you know whether or not you know [74] who he did talk to?

A. I stand corrected—no, I don't know

Q. Did Mr. Banner ever tell you who he was talking to in connection with this claim or your acquisition of the claim?

A. In connection with my acquisition of the claim, I think he told me sooner or later that he had talked to Mr. Alfaro—now, I'm not sure of that.

Q. That Mr. Banner had talked with Mr. Alfaro?

A. I think so.

Q. Did he tell you he had talked with Mr. Cohn in connection with it?

A. No, sir, I don't recall his telling me that he did.

Q. Did he tell you he had talked with Mr. Roy Kelly in connection with your acquisition of it?

A. No, sir.

Q. Was a copy of this agreement, a copy of which is marked Plaintiff's Exhibit 1, shown to you at the time you first discussed this matter with Mr. Banner?

A. Not when I first discussed it with him—no, sir—not the first time.

Q. Was it shown to you at a time between your first conversation and the date of the assignment?

[75] A. I'm sure that it was—yes—I believe it was.

Q. Now, Mr. Kramer, at the time when you acquired an assignment of this contract which has been marked Plaintiff's Exhibit 1, you had in the back of your mind that suit would have to be instituted on the contract, didn't you?

A. No, I would say that as a remote possibility it was there.

Q. You knew demand had been made and that it had not been paid, did you not?

A. No, sir—no, sir. I knew that an inadequate demand had been made.

Q. Did it occur to you to ask Mr. Banner why this claim of a Panamanian Corporation should be offered to you in Wichita Falls, Texas?

A. I didn't need to—Mr. Banner had had a number of dealings and matters that he had handled just about in all parts of the world—from Algeria to Saudi Arabia and Central and South America and Canada, and—did it occur to me? It didn't seem unusual to me at all, Mr. Harrell.

Q. Mr. Banner wasn't handling any claim in connection with this claim at the time you talked to him, was he?

[76] A. No, sir, not that I know of.

Q. And yet you didn't ask Mr. Banner how it was that this claim involving a Panamanian corporation should be offered to a resident of Texas, is that correct?

A. Well, it wasn't being offered to a resident of Texas at that time. Mr. Banner wasn't offering me the claim.

Q. Well, you were offered the claim by Panama and Venezuela Finance Company, were you not?

A. In a manner of speaking it was offered to me. Eventually it was delivered to me—yes.

Q. Yes. And did I understand you to say that you accepted the assignment on Panama and Venezuela Finance Company?

A. Yes, sir, I accepted that assignment when it came back on September 23 or after September 23—mailed with that letter.

Q. Prior to your obtaining this assignment, Mr. Kramer, had you seen the files of Panama-Venezuela Finance Company in connection with this claim?

A. No, I didn't see their files.

Q. Have you ever seen their files?

A. It may be that I saw part of their files, but I wouldn't have the slightest idea whether it was [77] their file or not, but have I seen their complete file—no—of course not.

Q. And Panama and Venezuela Finance Company sent you nothing in the way of correspondence or documentation in connection with this assignment of the contract or your claim?

A. That's what I was attempting to explain to you on the last question. Yes—there was some correspondence and there were some other instruments which were sent to me—to Mr. Banner for me. If it would make this any more brief—excuse me.

Q. Have you seen any of the files of Mr. Kelly in connection with this assignment?

A. My answer would be the same. It may be that I have seen letters out of his file, copies of letters or some instruments that came from his files but I can't tell you whether I saw his files or not.

Mr. Harrell:

Your Honor, we are going to object to Mr. Banner shaking his head up and down and across on every question we ask.

The Court:

I haven't been looking at him, but if he has been signaling, I instruct him not to signal.

Mr. Banner:

I haven't been signaling, Your Honor, and I don't think there is any necessity [78] for Mr. Kramer to look at me. He is looking at Mr. Harrell and not me.

Mr. Harrell:

Well, then, in that case I suggest the shaking is unnecessary.

Mr. Banner:

Morris, it's in utter incredulity at your line of questioning.

Mr. Spradley:

But it is a fact.

(By Mr. Harrell):

Q. Mr. Kramer, following the receipt of the assignment—

Mr. Banner:

If it please the Court, I don't know what Mr. Spradley's position in this cause is, but I don't particularly appreciate his sidebar remarks and comments to me as I sit here.

The Court:

Well, I can't hear those either so I instruct Mr. Spradley not to talk to Mr. Banner.

Mr. Spradley:

I apologize, Your Honor.

Mr. Banner:

Thank you, Your Honor.

(By Mr. Harrell):

Q. At the time, Mr. Kramer, that you were discussing with Mr. Banner your acquisition of this contract or claim on the contract, was there any agreement made with Panama-Venezuela Finance Company other than the assignment?

A. There was a collateral agreement, the terms of which were discussed.

[79] Q. Were the terms of the collateral agreement, as you call it, discussed with anyone other than Mr. Banner by you?

A. No.

Q. Did Mr. Banner tell you that he had discussed the matter with someone?

A. He told me what Panama-Venezuela Finance Company was willing to do and I assumed therefore that he spoke with someone.

Q. What did he tell you that Panama-Venezuela Finance Company was willing to do?

A. That they were willing to assign me the claim.

Q. Well, were they willing to do anything else?

A. Yes—ultimately they were.

Q. And what was that?

A. They were ultimately willing to assign the claim to me with no strings attached.

(Instruments marked by the Reporter as Defendant's Exhibits Nos. 1 and 2, for identification.)

(By Mr. Harrell):

Q. Mr. Kramer, I hand you what has been marked as Defendant's Exhibit No. 2, and ask you if that is a copy of the letter which transmitted the assignment and agreement from Panama-Venezuela [80] Finance Company to your attorneys?

A. Yes—as far as I know it is.

Q. And is that a copy of the letter which was handed to you by your attorney, Mr. Banner?

A. Yes.

Q. Along with the statement that that was the letter that had been received along with the assignment and the agreement?

A. Yes—I suppose so.

Mr. Harrell:

Your Honor, we offer in evidence Defendant's Exhibit No. 2.

Mr. Banner:

No objection, Your Honor.

(By Mr. Harrell):

Q. Mr. Kramer, was there transmitted by the letter dated September 23, 1964, marked Defendant's Exhibit 2, an agreement which has been marked as Defendant's Exhibit 1?

A. Yes, sir.

Q. Was there also transmitted by this letter marked Defendant's Exhibit 2, an assignment which has been marked Plaintiff's Exhibit 4?

A. Yes—as far as I know, that is correct.

Q. At the time that you received these exhibits—this assignment, the instrument in—entitled "Agreement" and the letter, had you already executed both the assignment and the agreement?

[81] A. Yes.

Q. And had those documents been transmitted to Mr. Banner?

A. Yes, sir.

Q. Do you know whether or not the assignment marked Plaintiff's Exhibit 4, was ever signed by any representative of Panama-Venezuela Finance Company?

A. It was signed by Mr. Alfaro.

Q. Did you see him sign it?

A. No, sir.

Q. Do you know him?

A. No, sir.

Q. Have you ever seen him sign any instrument?

A. No, sir.

Q. Then you don't know whether he signed the assignment marked Plaintiff's Exhibit 4, or not, do you, Mr. Kramer?

A. Not from witnessing his signature on it—no, I don't.

Q. As a matter of fact, you have never even met Mr. Alfaro, is that correct?

A. That's correct.

Q. Or talked with him?

A. That's correct.

Q. Or communicated with him in any form?

[82] A. That's correct.

Q. And I will show you Defendant's Exhibit 1, and ask you if the original of that exhibit bears your signature?

A. Yes, it does.

Q. Was the assignment to you which is marked Plaintiff's Exhibit 4 and the agreement between you and Panama and Venezuela Finance Company marked Defendant's Exhibit 1—are they dated the same date?

A. Yes—that's correct.

Q. I'll ask you who you ever talked to about the percentage of the net proceeds or monies obtained from Caribbean Mills in connection with this agreement which has been marked Defendant's Exhibit 1?

A. I discussed it with Mr. Banner.

Q. When did you discuss that with Mr. Banner?

A. Well, it would be somewhere between our first conversation in the summer of '64, and September 1, of 1964, and this of course took place over the biggest part of that period of time.

Q. And this was at the same time you were also discussing the contract between Panama-Venezuela, Kelly, and Caribbean Mills, is that right?

A. Yes—roughly the same month.

Q. Who first mentioned the fact that you would [83] give to Panama-Venezuela Finance Company 95% of any net recovery in this lawsuit?

A. I'm not sure who—you know—who brought it up first.

Q. Did you bring it up first?

A. Well, indirectly—I did. I told Mr. Banner that I did not want to put up any cash to purchase the claim, that I did not—that I would prefer not to borrow a large sum of money for it. On the other hand, I wanted a claim that was clear with no strings attached, that I wouldn't have to answer to anyone else for, and I don't know who brought it up, but ultimately I told Mr. Banner, "I don't want the assignment messed up," but I would give him a bonus.

Q. To be signed contemporaneously with the assignment?

A. No, sir—not necessarily.

Q. That's the way it was done?

A. That's the way it was done, but I think that assignment might have been executed without the bonus agreement—the collateral agreement at all.

Q. That is your assumption and not based upon any conversation you ever had with Panama-Venezuela Finance Company, is it?

A. No—no, it is not based on any actual or [84] parent authority.

Q. How was this figure of 95% arrived at, Mr. Kramer?

A. I don't know exactly how that figure of 95% was arrived at. I think we had some discussion about 90%.

Q. Discussion with whom?

A. With Mr. Banner—I had some discussion with Mr. Banner about it.

Q. Who was he representing at that time?

A. He was representing me.

Q. And do I understand then that you and he thought that 95% was the percentage that should go into this agreement?

A. Ultimately—yes, and I thought that was fair.

Q. Now, Mr. Banner was representing you before you got the assignment from Panama-Venezuela Finance Company in connection with what?

A. He was representing me in the—first of all—I would say—I don't know if he was representing me technically in the investigation or not. In the negotiations later, I would say he was—at least as a friend—he was.

Q. In the negotiations with Panama-Venezuela [85] Finance Company?

A. Well, in negotiations with whoever—the way I did it was—I told him to find out what he could about it and I would be willing to do this.

Q. Mr. Kramer, you said you didn't want to put out any money in connection with this matter, is that correct?

A. Yes—not any great sum.

Q. How much money have you put out in connection with it?

A. So far—$1.00.

Q. And that is the recited consideration for the assignment marked Plaintiff's Exhibit 4?

A. Yes, sir.

Q. Have you put out any money as far as expenses of the litigation is concerned?

A. Yes, sir—some.

Q. What expenses have you paid?

A. The expenses that I have paid—so far as actually paid in cash—have been my own expenses in connection with this matter, particularly those of traveling down here last week and this week for trial.

Q. What is your arrangement, Mr. Kramer, with Panama-Venezuela Finance Company insofar as expenses are concerned?

[86] A. I believe the agreement is that I must indemnify, or I have agreed to indemnify and hold them harmless from any and all expenses and Court costs both past and future in connection with the handling and prosecution of this claim.

Q. This agreement here which has been marked Defendant's Exhibit 1, provides on the second page —"It being understood by the parties hereto that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such

attorneys an amount not to exceed 33 and one-third per cent of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half the total of such expenses." What does that mean?

A. My understanding of it is this—that from the total recovery there is to be deducted one-third as attorneys' fees. Then off of what is left, half of the expenses come off before the 95 and 5 are computed.

Q. So that one-half of the expenses would then be paid by Panama-Venezuela Finance Company, is that correct?

A. No, I wouldn't put it that way. What they are entitled to under their contract is reduced by [87] one-half of the expenses. They don't have to come up with any cash.

Q. Who is going to pay the other half, Mr. Kramer?

A. I am responsible for it.

Q. So that as far as the expenses are concerned, you are responsible for one-half of the expenses of the litigation?

A. No, sir, I think you are trying to twist my words.

Q. I'm not trying to twist your words, I'm trying to find out what the situation is.

A. I am responsible for all the expenses. If there is no recovery, I am responsible for it. If there is a recovery, then one-half of the expenses, they come out of my five per cent and the other half of the expenses come out of their 95% per cent, and of course a proportionate share of the attorneys' fees comes out of both percentages.

Q. So that in any event of recovery, one-half of the expenses of the litigation will come out of the 95% that

goes to Panama-Venezuela Finance Company, is that right?

Mr. Banner:

Your Honor, I object to all of this. The contract speaks for itself and that is [88] the best evidence.

The Court:

I sustain the objection. It does speak for itself and that is really not my interpretation of it.

Mr. Harrell:

Your Honor, may I without arguing with the Court call Your Honor's attention to the language of this agreement, which to me seems somewhat ambiguous, and that is the reason why I am interrogating him on it.

The Court:

All right, read it to me.

Mr. Harrell:

It says—"it being understood by the parties hereto, that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such attorneys an amount not to exceed 33-1/3% of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half the total of such expenses. In other words, after the payment of attorney fees and expenses, Clayton S. Kramer is to pay to Panama and Venezuela Finance Company or its order, 95 per cent of the remainder of the net recovery, if any, and retain 5 per cent for his own use and benefit."

Mr. Banner:

If it please the Court, I think [89] that whole paragraph has to be read from the first, where it is stated that the net shall be determined by this particular formula.

Mr. Harrell:

Really what I am trying to find out is whether, or not any of the expenses are chargeable against the 95 per cent that will go to Panama-Venezuela Finance Company in the event of recovery.

The Court:

Well, let him answer the question as to what his understanding is. I think the contract does speak for itself, but he may testify as to his understanding.

Mr. Banner:

Note our exception.

The Witness Kramer:

Well, I may have misstated my understanding of the agreement a moment ago. From the gross recovery is deducted attorneys' fees. From that figure is then deducted expenses, and then from the balance we compute the 95 per cent and the 5 per cent.

(By Mr. Harrell):

Q. Mr. Kramer, did anyone ever tell you that the 95 per cent of the net proceeds or monies to go to Panama-Venezuela Finance Company in the event of recovery was an acceptable percentage to them?

A. That it was an acceptable percentage to them?

[90] Q. Yes.

A. Yes.—Mr. Banner told me that it was, and obviously Mr. Alfaro expressed their satisfaction with it.

Q. Did Mr. Banner tell you he had talked with anybody about the 95 per cent?

A. No, he didn't say he had talked to anybody but he said "It is agreeable with them".

Q. Did he tell you how he knew it was agreeable, if in fact it was?

A. No, sir.

Q. Did he tell you he had talked to Mr. Alfaro about that?

A. No, sir—he didn't.

Q. Would your testimony that it was all right with Mr. Alfaro be a presumption on your part?

A. Yes—it would be because at the same time I told Mr. Banner that this was all that I would do.

Q. Mr. Kramer, what have you done in connection with the prosecution of your claim? Do you understand that question, sir?

A. Yes, I understand it. After I accepted the claim I subsequently retained Mr. Banner's firm to represent me on a written contract, and then I authorized them to make formal demand on the claim—demand for [91] payment of the $165,000.

Q. Have you done anything else?

A. Well, I most certainly have. After—much to my shock—the demand was completely rejected, subsequent to that I authorized them to proceed with filing suit.

Q. You instructed your attorneys to file suit, have you done anything in connection with the direction of the handling of the suit?

A. Yes.

Q. What?

A. I have talked to them at different times ever since the suit was filed.

Q. That is to your attorneys?

A. Yes, they have told me what they intended to do, what they have done, what hearings were to be held, and what had been held. I have inquired what they were doing and why, and I most wholeheartedly approved of what they have done.

Q. Did you take an active part in the case as an attorney, Mr. Kramer?

A. No, sir, I didn't. Had I done that, I would have had the 33-1/3% and Mr. Banner would have had the 5%.

Q. Now, may I inquire Mr. Kramer, as to why [92] you did not prosecute this case yourself?

A. I think it is ridiculous for a lawyer to represent himself in litigation, or for that matter in quite a few other proceedings.

(Instrument marked by the reporter as Defendant's Exhibit No. 3, for identification.)

(By Mr. Harrell):

Q. Mr. Kramer, I hand you what has been marked as Defendant's Exhibit 3, and ask you if that is a photo copy of a contract you entered into with the law firm of Mock, Banner & McIntosh?

A. Yes, sir, it is.

Q. Under date of October 10, 1964?

A. Yes, sir.

Mr. Harrell:

We offer in evidence Defendant's Exhibit 3, Your Honor.

Mr. Banner:
No objection.

(By Mr. Harrell):
Q. Your testimony is that you signed this agreement between you and the Panama-Venezuela Finance Company marked Defendant's Exhibit 1, prior to your receipt from Panama-Venezuela Finance Company of the executed assignment to you, is that correct?
A. Yes.
Q. And the agreement which you signed made reference to the employment of attorneys and to the [93] sharing of any net recovery, is that correct?

Mr. Banner:
Your Honor, the instrument speaks for itself. We have gone over this four or five times.

The Court:
I sustain the objection.

(By Mr. Harrell):
Q. I will ask you, Mr. Kramer, if it is not a fact that in the taking of your deposition in this case on October 15, 1965, if I did not ask you the following questions to which you gave the following answers.

Mr. Banner:
What page, please, Morris?

Mr. Harrell:
Page 26.

"Question: At the time you acquired this claim by assignment, did you contemplate the institution of a

legal procedure—legal proceedings for the purpose of enforcing collection?

"Answer: No, I can't honestly say that I did.

"Question: You did not consider the necessity or advisability of instituting suit on the claim?

"Answer: It was in the back of my mind—yes."

You were asked those questions and those were your answers, are they not, Mr. Kramer?

[94] A. Yes, sir—those along with some other.

Q. And I further asked you, "And you knew as I understand it that demand had been made?

"Answer: I knew that some demand had been made. I don't think it was a formal demand.

"Question: Well, you knew that the installments had not been paid?

"Answer: That's right."

I asked you those questions to which you gave those answers?

A. To the best of my memory—you are reading it and it speaks for itself.

Q. Mr. Kramer, I understood you to say a few minutes ago in response to an earlier question that the agreement between you and Panama and Venezuela Finance Company was collateral to the assignment from Panama and Venezuela Finance Company to you?

A. Yes, sir.

Q. Is that what your testimony was?

A. Yes, sir.

Q. What do you mean that they are collateral?

A. I mean that the assignment stands on its own two feet and that assignment to me having been

made I have a perfect right to do with this claim and this cause of action as I please, including to drop it, [95] to forget it, to settle it, to file suit on it.

Q. Although the agreement which you signed prior to your receipt of the assignment makes reference to the filing of a suit, the payment of attorneys' fees, and the payment of net recovery, isn't that correct?

A. Out of an abundance of caution—yes, sir—it sure does say that, which I signed as an offer to them.

Q. Was this agreement an offer to Panama-Venezuela Finance Company?

A. I think—well—it was my last offer. I believe that has been agreed upon, Morris.

Q. When you say it was your last offer, do I understand you had some negotiations with them at the same time you submitted an earlier offer?

A. We may have—I know that Jack Banner and I discussed the 90% figure before this.

Q. And did you make an offer to Panama-Venezuela Finance Company to pay them 90% of any recovery?

A. As I recall I asked Mr. Banner if that would be agreeable with Panama-Venezuela Finance Company.

Q. And what did he tell you?

A. I'm not sure what he told me. I think he told me that he didn't think it would be agreeable with them, or he may have said "It isn't agreeable with them"—[96] I'm not sure.

Q. Do you know whether or not he discussed the matter of their getting 90% of any recovery with Panama-Venezuela Finance Company?

A. As you said before, I had the impression he did.

Q. And after they didn't take the 90%, do I understand you offered them 95%?

A. I don't know for sure if they refused to take the 90% or not. The 95% to my way of thinking was a fair way to do it. There were some negotiations but I was happy with the 95 and 5.

Q. And those were negotiations at a time prior to your receipt of the assignment from Panama-Venezuela Finance Company?

A. They were negotiations prior to the actual receipt of that agreement from Panama-Venezuela Finance—yes.

Q. Mr. Kramer, after you had had negotiations as to what percentage Panama & Venezuela Finance Company would get of any net recovery, you knew, did you not, that they expected suit to be instituted on this claim?

A. No, sir, I did not, and I did not expect it to be included either.

[97] Q. Is it your testimony that they were going to get 95 per cent of the recovery and that you had no obligation whatsoever to try to collect this item?

Mr. Banner:
Your Honor, that is ambiguous.

The Court:
I sustain the objection.

A. No, sir.

(By Mr. Harrell):

Q. Is it your testimony, Mr. Kramer, that you negotiated with Panama-Venezuela Finance Company in connection with the amount of percentage of the net

proceeds that they were to get, but that you had no obligation to try to collect this claim from Caribbean Mills?

A. No, sir, that's not what I mean. I did obligate myself to Panama-Venezuela Finance Company to use my best efforts to handle and prosecute this claim. However, if I didn't want to put a lot of money into it, I didn't want to go into hock the rest of my life for it—at the same time I didn't expect them to just completely sit there and say, "Take it all for the $1 plus your promises to prosecute the claim, plus your indemnity agreement," and there were brief negotiations—I finally told Jack, or Jack and I talked it over and decided that was one way to do it—was by paying a bonus, and I thought that that was fair, but the bonus—this collateral agreement was to have [98] nothing to do with the assignment.

Q. The agreement marked Defendant's Exhibit 1, makes reference to the assignment, does it not?

A. The agreement makes reference to the assignment, but the assignment does not make reference to the agreement, as I recall.

Mr. Banner:

Your Honor, again the instrument speaks for itself and would be the best evidence.

The Court:

Let him answer the question.

(By Mr. Harrell):

Q. The agreement marked DX-1, recites, "It is hereby collaterally agreed that in the event of payment or recovery on said contracts by Clayton S. Kramer,"—to what instrument was the agreement collateral?

A. The agreement was collateral to the assignment from Panama-Venezuela to me. The agreement contained a personal promise which was not to be connected with or to interfere with the assignment to me.

Q. Mr. Kramer, I believe I have asked you about whether or not you had conversations with anyone with Panama-Venezuela Finance Company at the time of the assignment and agreement. I would like to ask you if you had any conversations with anybody with Panama-Venezuela Finance Company since the assignment?

A. No, I have not.

[99] Q. Do you know anything about the facts in this case, Mr. Kramer, other than what Mr. Banner has told you?

A. No, except some facts that I gathered from some—a couple of letters that may—you know—have been written back there early in 1959.

Q. But those letters were not to you or from you, were they?

A. Oh, no, and of course some facts I have gathered from looking through the pleadings and the depositions and the papers on file.

Q. Those are facts that you have gathered from some source other than your own knowledge?

A. Yes, they are—that's correct.

Q. Mr. Kramer, who prepared the assignment and the agreement?

A. I believe Mr. Banner did, I'm quite sure of it.

Q. Mr. Kramer, was there anything ever said to you at the time when you and Mr. Banner were talking about this contract or this claim about bringing suit in Federal Court?

A. No, sir.

Q. Was there anything said to you or relating to the matter of the Federal Court—a Federal Court [100] suit on this claim?

A. You—no, sir, there wasn't.

Q. At any time?

A. Before suit was filed?

Q. Yes.

A. Whether before demand it was filed—no. While we were discussing the possibility of acquiring the claim—no, sir.

Q. Was there any discussion about the filing of the suit in Federal Court prior to its being filed?

A. Yes—I know there was some talk about the suit, or, I believe we discussed where it would be filed, which Court, but that was shortly before suit was filed. It was after the demand was rejected.

Q. Was there ever any discussion as to why Panama-Venezuela Finance Company didn't file this suit against Caribbean Mills?

A. No, sir.

Mr. Banner:

Your Honor, that would be completely immaterial and irrelevant, hearsay, and everything else, and solve no ultimate issue in this case.

The Court:

I'll overrule the objection—he has answered the question.

(By Mr. Harrell):

Q. Do you know whether or not [101] Mr. Banner had any discussions with Panama-Venezuela Finance Company with respect to the institution of the suit on this claim in Federal Court?

A. No, sir, I honestly don't know if he did or not.

Mr. Harrell:

Your Honor, I don't think of any questions that I want to ask of this witness under these circumstances. It might be that I would have wanted this to—Well, it might be that I would have one or two questions that might be asked in the presence of the Jury tomorrow.

The Court:

All right, if you will be on the witness stand at 9:00 o'clock.

Mr. Banner:

May I ask one or two questions in relation to some—to this matter at this time, Your Honor?

The Court:

Yes.

RE-DIRECT EXAMINATION

By Mr. Banner:

Q. Mr. Kramer, I want you to tell the Court whether or not Panama-Venezuela Finance Company has exercised any control, management, or supervision of the means or manner in which you have handled or prosecuted the claim under the agreement marked Plaintiff's Exhibit 1?

[102] A. No, absolutely not. That is the way I wanted it to be when I acquired that claim.

Q. State whether or not at the time of the conversation between yourself and myself, and all times prior to the demand being made, any conversation was had as to the necessity of filing suit in order to enforce that contract?

A. No, there wasn't any. I didn't need to ask you. I knew of the Murchisons. I worked with the U.S. F&G., I knew of their reputation as a bonding company and an insurance company and the thought never occurred to me that they would welch on that agreement—one as clear as that. I didn't even ask you about it.

Mr. Banner:
That's all.

RE-CROSS EXAMINATION

By Mr. Harrell:

Q. Mr. Kramer, you never communicated with anybody from Panama-Venezuela Finance Company in connection with this matter either before or after the assignment, have you?

A. No.

Q. And you don't know what communications, if any, may have taken place between any representatives of that company and Mr. Banner, do you?

A. No. I know about the letter of transmittal—[103] naturally.

Q. But other than that, you don't, do you?

A. No, sir, I don't think I do.

Q. And you do know that they entered into an agreement with respect to the amount of the attorneys' fees that should be paid in connection with this case, don't you?

A. I entered into an agreement whereby I personally promised to pay them a certain sum, and I left myself room for the possibility of attorneys' fees.

Q. I'm sorry—but as far as the control and management and so forth, Mr. Kramer, Panama &

Venezuela Finance Company entered into an agreement with you by which they authorized the amount of Mr. Banner's law firm for a 33 and 1/3 per cent fee, didn't they?

A. No, sir.

Mr. Banner:

If it please the Court, the instrument speaks for itself and it is the best evidence.

The Court:

I sustain the objection.

(By Mr. Harrell):

Q. You didn't know, as I understand it, from your answers to questions by Mr. Banner that there would be a necessity as to suit, is that correct?

A. No, sir, I didn't know that there would be.

[104] Q. But you knew you might have to bring a suit?

A. That's what I meant when I said it was in the back of my mind. Obviously it's going to be in the back of a person's mind nearly any time he does anything.

Q. And you knew yourself in the back of your mind you might have to bring suit on this claim?

A. Yes, but this was a long way back.

Q. Nevertheless, it was there, wasn't it?

A. Yes—it was there.

Q. And when you said that, you didn't know that the Murchisons would welch on that agreement, I thought you said a few minutes ago that you knew nothing about the facts in this case as far as the original transactions were concerned?

A. I believe I testified that of my own personal knowledge I did not know any of the facts. As I recall that is what I testified to, and with regard to this matter of retaining an attorney, it was in my mind at the time that I was going to make whatever demands I made through an attorney. In other words, that clause about retaining an attorney is in there—to make the demand.

Q. From your knowledge you don't know—you didn't know then and you don't know now whether or not [105] the Murchisons have lived up to any contractual agreement that they have, isn't that a fact?

A. Mr. Harrell, I have a pretty good idea from what I have seen in the lawsuit and in the depositions. Of my own personal knowledge, I know that I have never received a dime from them—that's right.

Q. And you have no knowledge of the facts as they existed at the time of the transaction?

Mr. Banner:
Your Honor, this is repetitious.

The Court:
I sustain the objection.

Mr. Harrell:
That's all, Your Honor.

The Court:
All right, I will see you at 9:00 o'clock in the morning.

(At this time the proceedings recessed for the evening recess and resumed as hereinafter shown.)

[106] Proceedings.

Thursday, May 26, 1966.
Dallas, Texas.

(Jury in jury box.)

The Court:
Good morning. Have you finished with Mr. Kramer or not?

Mr. Harrell:
No, Your Honor, I have a few more questions to ask.
If I have not already offered them, I now offer Defendant's Exhibits 1, 2, and 3.

Mr. Banner:
We would object to the submission of Defendant's Exhibit 1, to the Jury, it being completely collateral to this matter.

The Court:
I will read it and you may go ahead.

CLAYTON S. KRAMER, the witness heretofore named, having been previously sworn, testified further on his oath as follows:

RE-CROSS EXAMINATION – (Continued):

By Mr. Harrell:
Q. Mr. Kramer, have you in any way communicated with any persons who are connected in any way with Panama-Venezuela Finance Company?
A. Not personally—no.

[107a] Q. At no time, sir?

A. At no time.

Q. That includes both before and after the filing of this lawsuit?

A. That's correct.

Q. Have you at any time communicated with Mr. Roy Kelly?

A. No, sir.

Q. Have you in any way personally communicated with Mr. Roy Cohn?

A. No, sir.

Q. And have you communicated in any way with Mr. Eduardo Alfaro?

A. No, sir.

Q. Do you know Mr. Eduardo Alfaro?

A. No, sir, I do not.

Q. Mr. Kramer, I show you what has been marked as Plaintiff's 4 and entitled "Assignment," and ask you whether you know of your own knowledge whether or not that instrument bears the signature of Eduardo Alfaro?

A. I know that he has sworn that it is his signature. Of my own personal knowledge—no—I don't know that that is his signature.

Q. Where has he sworn that that is his signature?

[107b] A. In his deposition.

Mr. Harrell:

We would again object to that comment by the witness as to what Eduardo Alfaro has sworn in his deposition.

My question was whether or not this witness knows.

The Court:

I sustain the objection.

(By Mr. Harrell):

Q. You do not know, Mr. Kramer, of your own knowledge whether or not Eduardo Alfaro executed or signed this assignment marked Plaintiff's Exhibit 4?

A. No, sir, I did not see him sign it.

Q. It was signed out—it was not signed in your presence?

A. No, sir.

Q. And you don't even know him?

A. No, sir, I don't.

Q. And you don't know his signature, do you?

A. Not from having seen him sign any instrument in my presence.

Q. Mr. Kramer, this instrument (referring to Plaintiff's Exhibit 4) recites that Panama-Venezuela Finance Company for and in consideration of $1 and other good and valuable consideration "receipt of which is hereby acknowledged, does hereby assign, [108] sell, and convey to Clayton S. Kramer," and so forth—what is the other good and valuable consideration?

Mr. Banner:

May it please the Court, I think the Court has already instructed counsel in that regard.

The Court:

I don't know that I have instructed him in that regard, but I sustain the objection.

Mr. Harrell:

Your Honor please, in the light of the Court's ruling, I desire to ask Mr. Kramer some questions with

respect to what has been marked Defendant's Exhibit 1, for the purpose of showing the interest of Eduardo Alfaro and Panama-Venezuela Finance Company in this action, in view of the facts that the testimony of Mr. Eduardo Alfaro has been admitted in evidence over our objection.

The Court:

I am not going to discharge the Jury at this time. Now, you may do that at some later time.

Defendant's Exhibit 1 will be admitted for the Court and not for the Jury.

Mr. Banner:

Thank you, Your Honor.

Mr. Harrell:

Your Honor, do I understand that at my request, the purpose of interrogating that witness for that purpose is denied?

[109] The Court:

Yes,—in the presence of the Jury.

Mr. Harrell:

Note our exception.

(By Mr. Harrell):

Q. Mr. Kramer, do you know of your own personal knowledge of any of the facts in connection with the negotiation and the execution of this agreement entered into as of the 30th day of May, 1959?

A. Of my own personal knowledge—I do not.

Q. Isn't it a fact that the first time you ever heard

of this instrument, Plaintiff's Exhibit 1, entered into as of the 30th day of May, 1959, was in 1964?

A. That's correct.

Mr. Harrell:

I believe that is all.

Mr. Banner:

No further questions.

The Court:

All right, you may step down, Mr. Kramer.

(At this time the Witness Kramer departed the witness stand.)

* * *

CLAYTON S. KRAMER, having been previously sworn, testified further on his oath as follows:

DIRECT EXAMINATION

By Mr. Harrell:

Q. Mr. Kramer, you did execute an agreement, did you not, between yourself and Panama and Venezuela Finance Company by which Panama and Venezuela Finance Company was to have 95% of the proceeds or monies obtained from Caribbean Mills or others under and by virtue of the contracts?

A. No, sir. Do you want me to explain my answer to that?

[396] Q. Yes, if you will, sir?

A. I am personally obligated by virtue of this agreement to pay Panama and Venezuela Finance

Company a certain amount of money, the exact amount to be determined as set out in this agreement, but they have no interest in this lawsuit or this claim.

Q. Well, I'm not asking you for your construction of the agreement, Mr. Kramer, I'm really asking you in the interest of time whether you executed this agreement?

Mr. Harrell:

A. Yes—I executed that agreement, but your question included a construction.

Mr. Harrell:

I believe that this agreement has been marked as an exhibit, Your Honor,—it has been marked as Defendant's Exhibit No. 1

The Witness Kramer:

Yes—I executed that agreement.

Mr. Harrell:

Pass the witness.

Mr. Banner:

No questions.

The Court:

All right.

(At this point the Witness Kramer departed the witness stand.)

EXCERPTS FROM DEPOSITIONS

Deposition of Arthur Haas

DIRECT EXAMINATION

By Mr. Banner:

* * *

[4] A. I am an officer of several corporations in which the Investments Management Corporation is involved.

Q. Would you give us the names of those corporations, sir? A. Frankly, they are quite numerous. There are, my guess would be there are over 40 or 50 corporations involved, and I am afraid I couldn't give you the answer you asked for.

Q. Where do you maintain your offices for the purpose of doing business? A. 1201 Main Street.

Q. Dallas, Texas? A. Correct.

* * *

[5] Q. Now then, I'll ask you to state whether or not you are an officer of a corporation known as Caribbean Mills, Incorporated? A. Yes.

Q. And what is your particular capacity with that corporation? A. I'm president of that corporation.

* * *

[7] Q. Now, what is the business, or what is the purpose of Caribbean Mills, Incorporated? A. Manufacturer of flour and by-products.

Q. Now, what other kind or types of by-products does [8] it manufacture? A. Those by-products which are naturally incident to the making of flour.

Q. Would you give us some examples, sir? A. Mill feed.

* * *

[16] Q. Would you state the names of the directors of the corporation at this time? A. George Leger, Walter Spradley, Holman Jenkins, myself. I think that's all now. There may have been one more, I'm not sure.

Q. At this time you know of only four directors? A. I'm saying there may be—I'm not positive on that.

Q. All right, sir. A. I believe there are only—there are four or five directors, and I think those represent most of them.

Q. Mr. Holman Jenkins is also a resident of Dallas, Texas; is he not? A. To the best of my knowledge.

* * *

[32] Q. All right, sir. Mr. Haas, since you have been president of Caribbean Mills, have you arranged for any financing at the Mercantile National Bank here in Dallas? A. Yes, I have.

Q. For and in behalf of the corporation? A. Well, to answer your question specifically, mainly for and in behalf of Murchison Brothers.

Q. Did the corporation that you are president of, sign the note in question? A. Yes.

* * *

[34] Q. I'll ask you to state whether or not Caribbean Mills, Incorporated, have maintained a bank account in the State of Texas since the period of time you have been [35] president. A. Yes, they have.

Q. In what bank or banks? A. Well, let's see, they have numerous bank accounts all over, not just in the State of Texas. They maintain some accounts here in Dallas, Texas.

Q. Could you give us the names of the banks? A. Mercantile, First National and Republic.

* * *

[36] Q. (By Mr. Banner) I'll ask you to state whether or not any banking or financial institution has issued any letters of credit in behalf of Caribbean Mills, Incorporated, in the State of Texas, since you have been president. A. Yes, they have.

Q. On more than one occasion? A. Yes.

* * *

[37] Q. Have you, on occasion, signed checks in behalf of the corporation here in Texas? A. Yes, rarely.

* * *

[38] Q. When does Caribbean Mills acquire title to the wheat, at the time of purchase or when it reaches Haiti? A. Normally, the time it is loaded on the vessel in Duluth, Superior, Wisconsin, or Baltimore, Maryland, or wherever the wheat is loaded.

Q. Is any of the wheat used by the flour mill loaded in Galveston or Houston, Texas? A. I have known of an occasion for it to be loaded there.

* * *

[40] Q. Are the physical structures and assets of the corporation insured? A. Yes, they are.

Q. By whom are they insured? A. I believe it's Hanover Insurance Company. We have shifted this policy around a few times.

Q. Who is the agent that wrote the policy? [41] A. Kenneth Murchison & Company.

Q. And where is Kenneth Murchison & Company located? A. In Dallas.

* * *

[56] Q. All right, sir. Quite simply: Who exercises the final and executive decision making powers in relation to this corporation? A. I would say the creditors of the corporation.

[57] Q. And who are the creditors? A. Murchison Brothers. I would say the banks that loan us money have quite a bit to say about what we do, the Royal Bank of Canada, and others.

Q. Are all of the obligations of the Caribbean Mills, Incorporated, endorsed or guaranteed by Murchison Brothers, or the Murchison interests? A. I know of very, very few of any substance that are not guaranteed or collateralized by the Murchisons.

Deposition of Walter M. Spradley

DIRECT EXAMINATION

By Mr. Mock:

* * *

[26] Q. Now, what office do you now hold? A. Vice-president and assistant secretary.

* * *

[28] But apparently I was mistaken in saying that it was incorporated in 1955, because what I did find is a letter dated January 19, 1956, addressed by R.B. Kelly to George N. Leger, instructing him in respect to various matters and capitalization and so forth, in which he says that he, he lists the directors and officers who are to be the initial directors and officers, and those are Roy B. Kelly—these are the directors, Roy B. Kelly, Cecil B. Hagen, Harry A. Grebbe, J. Wilbur Neptune and Max Dennis. The original officers were to be Roy B. Kelly, president, C. B. Hagen, vice-president, Harry A. Grebbe, vice-president and Walter M. Spradley, secretary and treasurer.

Q. All right. Now, where did those gentlemen live, Walter? Take the officers first. A. Roy B. Kelly, to the best of my knowledge, lived in Washington, D.C. at the time. Cecil B. Hagen, I believe, lived in New York, or Washington. I'm not sure which.

Q. Didn't Mr. Hagen live in Galveston, Texas? A. I think Mr. Hagen was originally from Galveston, Texas, but I'm sure he was not living there then. I'm not sure either because I don't know where he lived.

Q. All right. Go ahead. A. But Harry A. Grebbe, I think, lived in Houston, Texas. And I lived in Dallas.

* * *

[32] Q. Have you ever signed any contracts in your capacity as an officer of Caribbean Mills? A. The only contract I can recall having signed is the one in question here.

* * *

[33] Q. Now, the one in controversy here, the one upon which the lawsuit is based, where were you physically at the time you signed it? A. I think in Dallas.

* * *

[48] A. I think initially the money, the principal money was borrowed from the Mercantile National Bank and Allis Chalmers Manufacturing Company.

Q. All right. About what amount was borrowed from [49] the Mercantile National Bank?

That's here in Dallas, of course?

Deposition of Clint Murchison, Jr.

DIRECT EXAMINATION

By Mr. Banner:

* * *

[5] Q. For the purpose of the record, will you tell me your name? A. Clint Murchison, Jr.

Q. And where do you reside, please, sir? A. In Dallas.

Q. And what is your address here in Dallas? A. 6200 Forest Lane.

Q. And do you maintain offices for business purposes here in Dallas? A. Yes sir.

Q. And where are those offices located? A. 1201 Main Street.

Q. Now then, you are one of the owners of Caribbean Mills, Incorporated; are you not? A. Yes.

Q. Is your participation in the ownership of Caribbean Mills by way of a joint agreement with your father [6] and brother, or do you have an individual interest in Caribbean Mills, Inc.? A. The stock is owned by Murchison Brothers, a partnership of my brother and myself.

* * *

[12] Q. When is the first time that you individually had any particular relationship with this corporation? A. Well, it was sometime after it was formed, and after the plans had been prepared to build the mill, somebody contacted me and said that a mill was going to be built down there in a company in which my family has an interest and of which I'm president, was interested in building it or expressed—I mean they said, "Are you interested in building it?" And I said, "Yes".

Q. As a construction proposition? A. Yes.

Q. Now, what corporation or firm was this? [13] A. Tecon Corporation.

* * *

Q. And where did this first contact take place, Mr. Murchison? A. Probably in my office.

Q. Here in Dallas? A. Yes.

* * *

[14] Q. I'll ask you to state whether or not this discussion later ended up in Tecon building the particular flour mill or plant? A. It did.

Q. And with whom was the contract of construction signed? A. You mean what company?

Q. Yes sir. A. I don't remember. It was one of either Caribbean Mills or this Societe Haitienne.

Q. All right. The predecessor in name? A. Yes.

Q. Whichever name it was going by at that time? A. Yes.

[15] Q. Signed a contract with Tecon, your construction company, to actually construct the flour mill in question? A. Yes.

Q. And that contract was drawn and signed here in Dallas, Texas; was it not? A. I don't know where it was drawn. I presume it was signed here.

* * *

[38] Q. Mr. Murchison, who actually decides the company policy in relation to the scope, or nature of activity? A. Its creditors.

Q. And who are its creditors then? A. My brother and myself.

Q. Would you in turn transmit your wishes in this regard to Mr. Haas and he in turn see that they were carried out? A. Yes.

Q. And that's done here in Texas? [39] A. That's done here in Dallas.

JUDGMENT

Filed Jul. 6, 1966.

[Caption Omitted in Printing]

Be It Remembered that on the 25th day of May, A.D. 1966, the above styled and numbered cause was called for trial by the Court; that both sides appeared and announced ready and thereafter a Jury was selected. After the Jury was impaneled, the case proceeded to trial with both sides presenting testimony and evidence.

That thereafter, on the 27th day of May, A.D. 1966, the parties completed their presentation of testimony and evidence and the Court, charged the Jury and submitted Special Interrogatories for the Jury to answer. Thereafter, the Jury retired and deliberated upon its Verdict.

At approximately 4:15 o'clock P.M., May 27, 1966, the Jury returned their Verdict into Court. Such Verdict was duly signed by Mr. Easterwood, Foreman of the Jury. Such Jury Verdict consisting of Answers to Special Interrogatories as follows:

"Special Issue No. 1:

Do you find from a preponderance of the evidence that Roy Kelly assigned all of his interest in the Agreement of May 30, 1959, except for any interest he had in the $85,000 cash payment, to Panama and Venezuela Finance Company?

Answer 'yes' or 'no'.

Answer Yes.

Special Issue No. 2:

Do you find from a preponderance of the evidence that Panama and Venezuela Finance Company assigned all its interest, if any, under the May 30, 1959 Agreement to Clayton Kramer?

Answer 'yes' or 'no'.

Answer Yes.

Special Issue No. 2-a:

What do you find from a preponderance of the evidence to be the amount, if any, of the interest, if any, of Panama and Venezuela Finance Company at the time of the assignment, if any, of its interest under the May 30, 1959 Agreement to Clayton S. Kramer?

Answer in dollars, if any, and cents, if any.

Answer $165,000.00.

Special Issue No. 3:

Do you find from a preponderance of the evidence that all the parties who entered into the May 30, 1959 agreement intended at the time the agreement was negotiated and executed that the $165,000 in payments would be subject to and pledged as security for the Roy Kelly indebtedness to Sid Richardson?

Answer 'yes' or 'no'.

Answer No.

Special Issue No. 4:

Do you find from a preponderance of the evidence that Roy Cohn or Roy Kelly with knowledge of the rights, if any, of Panama and Venezuela Finance Company represented to Caribbean Mills, Inc. that the Finance Company claimed no further interest in or right to any further payments under the Agreement of May 30, 1959?

Answer 'yes' or 'no' as to each:

(a) Roy Cohn No.
(b) Roy Kelly No.

If you have answered either (a) or (b) of special issue no. 4 'yes', then answer special issue nos. 5 and 6. Otherwise, do not answer special issues nos. 5 and 6.

Special Issue No. 5:

Do you find from a preponderance of the evidence that Roy Cohn or Roy Kelly had apparent authority to make such representations, if any, for Panama and Venezuela Finance Company?

Answer 'yes' or 'no' as to each.

(a) Roy Cohn .....
(b) Roy Kelly .....

Special Issue No. 6:

Do you find from a preponderance of the evidence that Caribbean Mills, Inc. relied on such representations, if any?

Answer 'yes' or 'no'.

Answer .....

Special Issue No. 7:

Do you find from a preponderance of the evidence that Panama-Venezuela executed the agreement of May 30, 1959 believing it to be the full and only agreement between Roy Kelly, Caribbean Mills, and Panama-Venezuela?

Answer 'yes' or 'no'.

Answer Yes.

Special Issue No. 8:

Do you find from a preponderance of the evidence that Caribbean Mills intentionally omitted matters from the contract in question?

Answer 'yes' or 'no'

Answer Yes.

If you have answered special issue no. 8 'yes', then answer special issue no. 9. Otherwise, do not answer special issue no. 9.

Special Issue No. 9:

Do you find from a preponderance of the evidence that Caribbean Mills failed to inform Panama-Venezuela that matters had been intentionally omitted from the contract in question, if you have so found?

Answer 'yes' or 'no'.

Answer Yes.

If you have answered special issue no. 8 'yes' then answer special issue no 10. Otherwise do not answer special issue no. 10.

Special Issue No. 10:

Do you find from a preponderance of the evidence that Panama-Venezuela would not have executed the contract in question had they known matters had been intentionally omitted, if you have so found, by Caribbean Mills?

Answer 'They would not have' or 'They would have'.

Answer They would not have."

That such Verdict was accepted by the Court and ordered filed.

The Court have considered the Verdict of the Jury, the testimony and evidence introduced into evidence during the trial and the law applicable hereto, is of the opinion that the Verdict of the Jury, the facts and the law are with the Plaintiff, and therefore, finds that the Plaintiff is entitled to and should receive Judgment against the Defendant herein in the sum of One Hundred Sixty-five Thousand Dollars ($165,000.00).

It is, therefore, Accordingly Ordered, Adjudged and Decreed that the Plaintiff, Clayton S. Kramer, has and is hereby granted Judgment against the Defendant, Caribbean Mills, Inc., a corporation, in the sum of One Hundred Sixty-five Thousand Dollars ($165,000.00); that in addition thereto, the said Plaintiff is entitled to and is hereby granted Judgment against the Defendant for interest at the rate of six percent (6%) on such sum of One Hundred Sixty-five Thousand Dollars ($165,000.00) from the date of entrance herein until such sum be fully paid and discharged. It is further Ordered, Adjudged and Decreed that all costs of this action be and they are hereby taxed against the Defendant, Caribbean Mills, Inc.

For such sums and amounts let execution enter. To all of which action the Defendant excepts.

Entered this the 6th day of July A.D. 1966.

SARAH T. HUGHES,
District Judge.

Approved as to form:

MORRIS HARRELL,
(Morris Harrell),
Attorney for the Defendant.

JACK BANNER, Atty. for Plaintiff.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24090

CARIBBEAN MILLS, INC.,
Appellant,

versus

CLAYTON S. KRAMER,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(January 26, 1968.)

Before BROWN, Chief Judge, and BELL and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: Because we conclude that the requisite diversity of citizenship does not exist in this case, it will not be necessary to recite the facts in great detail. Appellant, Caribbean Mills, Inc., is a foreign corporation organized under the laws of Haiti where it operates a flour mill. On May 30, 1959, it entered into a written agreement with a man named Kelly from Washington, D.C. and the Panama and Venezuela Finance Company, a for-

eign corporation organized under the laws of Panama. Under the terms of the agreement, appellant was to purchase from Panama 125 shares of corporate stock for a down payment of $85,000 plus installment payments amounting to an additional $165,000. Because of subsequent developments and appellant's interpretation of the contract in light of these developments, the installment payments were never made.

On September 21, 1964, Panama and Kelly assigned their interests under the 1959 contract to Clayton Kramer, an attorney in Wichita Falls, Texas and appellee here. The consideration was $1.00. By separate instrument executed on the same day, Mr. Kramer reassigned 95% of his newly acquired interest to Panama.[1] Thereafter, he filed suit against Caribbean Mills for $165,000 in the United States District Court for the Northern District of Texas.[2] The trial judge overruled appellant's motion to dismiss on jurisdictional grounds and proceeded to trial. The question of contract interpretation was submitted to a jury, which returned a verdict in favor of appellee for $165,000. In appealing the judgment entered on this verdict, Caribbean Mills urges, *inter alia*, that the sole purpose of the assignment from Panama to Kramer was to create diversity of citizenship under 28 U.S.C. § 1332 (a)(2) (suit between citizen of

[1] Under the second instrument, Kramer had the right to pay his attorney 33-1/3% of any recovery. He was to retain 5% of the remainder and pay Panama 95% as a "bonus."

[2] There is no question that appellant had sufficient business contacts in Dallas, Texas to render itself amenable to process in the Northern District.

a state and citizen of a foreign state) and that such a tactic brings into play 28 U.S.C. § 1359, which says that a federal court shall not have jurisdiction where a party "by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." On oral argument before this Court, counsel for appellee made no particular effort to deny that Mr. Kramer is simply an assignee for purposes of collecting Panama's claim in federal court, but he argued that the assignment from Panama is valid on its face and that under the decided cases the motives for making it are of no import. Because we believe that 28 U.S.C. § 1359 has more force than appellee is willing to admit, we must reverse and remand with directions to dismiss for want of jurisdiction. While it may seem wasteful to divest the federal courts of jurisdiction after judgment has been entered on a jury verdict, there are deeper considerations which compel this result. In construing the very statute before us, the Tenth Circuit said,

> But, after all, it is the words of a federal statute we construe in the context of an historical purpose to deny diversity jurisdiction when it would operate to serve a purpose which is unsuited to the good order of federal court administration.

Bradbury v. Dennis, 10th Cir. 1962, 310 F.2d 73, 76.

I.

By assigning its interest under the contract and obtaining a reassignment of 95% of that interest on the same day, Panama obviously intended to designate Kramer as a collection agent with the capacity to sue in federal court. To construe these transactions in another way would require serious departure from any traditional notion of reality. The question presented, then, is whether under Section 1359 an assignee for collection purposes can properly invoke federal jurisdiction. In our view, he cannot do so because the assignment to him was made for the purpose of creating federal jurisdiction without divesting the assignor of his interest in the law suit. To support this conclusion, we must delve into the history of Section 1359 and some of the old cases.

Broadly speaking, Section 11 of the Judiciary Act of 1789 denied federal jurisdiction to an assignee of a cause of action if it was unavailable to his assignor, i.e., if his assignor could not have brought the same suit in federal court. With changes in language, the "assignee clause" remained a part of the law until 1948. Wright, *Federal Courts* § 31, at 85 (1963 ed.). Section 37 of the Judicial Code of 1911, which stemmed from the Act of 1875, commanded the dismissal or remand of an original or removed action when the parties had been "improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable." 3 J. Moore, *Federal Practice* ¶ 17.05, at 1319 (1967 ed.).

In the 1948 Judicial Code, the Reviser condensed these two sections into Section 1359, the statute we have today. The Reviser's Notes indicate that the purpose of condensing the two sections into one was twofold: To eliminate confusing and unnecessary exceptions to the assignee clause and to eliminate the effect of that clause on bona fide assignees. Under the original clause, a bona fide assignee could not sue in federal court unless his assignor could have; under Section 1359, any assignee can sue in federal court so long as he was not improperly or collusively made a party in order to invoke federal jurisdiction. The Reviser's Notes do not suggest any other change in law or policy.

With this legislative background in mind, we turn to the pre-revision cases. These cases clearly reveal that the device employed by Panama would not have passed muster under pre-revision statutes. *Williams v. Nottawa*, 1881, 104 U.S. 209, 26 L.Ed. 719, involved an action against a township upon township bonds payable to bearer. Williams, the plaintiff, sued on three of the bonds as owner; but the rest of them had been transferred to him for collection purposes by citizens of Michigan, the state in which the township was located. The Supreme Court held that the transfer was colorable in the sense that it was never intended to change the ownership and was made only for the purpose of "creating a cause cognizable in the courts of the United States." The suit was therefore dismissed as being in contravention of the policy of the Act of 1875. The Reviser's Notes do not indicate

that the policy of dismissing under these circumstances was changed by the enactment of Section 1359.

Two later cases following *Williams v. Nottawa* lend further support to the principle that a federal court has no jurisdiction over an action brought by a collection agent to whom an assignment or transfer has been made for the purpose of creating diversity. In *Southern Realty Investment Co. v. Walker*, 1909, 211 U.S. 603, 29 S.Ct. 211, 53 L.Ed. 346, some Georgia attorneys had created a dummy corporation in South Dakota that was used as an agent to collect the claims of Georgia citizens against Georgia citizens in federal court. The Supreme Court held that under the Act of 1875 a diversity suit could not be maintained by the corporation in behalf of Georgia citizens. In *Central Paper Co. v. Southwick*, 6th Cir. 1932, 56 F.2d 593, Southwick had been assigned four claims for $1.00 each so that he could bring suit in federal court. He, like Mr. Kramer in the case at bar, appears to have arranged a fee for his efforts to collect. While it is not clear from the opinion that the reason for the assignments was to create diversity of citizenship, the court observed that the Act of 1875 and cases like *Williams v. Nottawa* prohibited "assignments of the technical legal titles to claims to plaintiffs for the purpose of permitting them to bring suits in federal courts for the purpose of collecting the same." 56 F. 2d, at 596. It found the four assignments to be colorable or fictitious and hence improperly made to invoke federal jurisdiction.

The three cases just discussed are factually similar to the instant case and serve to demonstrate that courts interpreting the Act of 1875 considered an assignment for the purpose of enabling collection in federal court to be improper within the meaning of the statute. Three other cases, which are not so similar factually but perhaps more well-known, are illustrative of the same proposition. In *Lehigh Mining & Mfg. Co. v. Kelly*, 1895, 160 U.S. 327, 16 S.Ct. 307, 40 L.Ed. 444 and in *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 1908, 211 U.S. 293, 29 S.Ct. 111, 53 L.Ed. 189, stockholders of one corporation transferred fee title in land to a sham corporation in another state without valuable consideration for the purpose of creating federal jurisdiction. In *Miller & Lux*, the Court summarized the transaction as follows:

> . . . the transfer of the property of the California corporation to the Nevada corporation was merely formal,—only a device by which to have the rights asserted by the California corporation in a state court determined by the Federal court rather than by the state court. The agreement that all the property of the California corporation should be transferred to the Nevada corporation was attended by the condition that all the capital stock of the new corporation should be issued—and it was issued—to the California corporation, which remained in existence with full power, as the owner of such stock, to control the operations of the Nevada corporation.

211 U.S., at 304, 29 S.Ct., at 114. The Court held that the Nevada corporation was collusively made plaintiff in the suit for the purpose of creating federal jurisdiction and therefore that jurisdiction failed under the Act of 1875. The reason jurisdiction failed was not that the California corporation made a transfer with the motive of getting into federal court but rather that the transfer was colorable, indeed a sham, and was undertaken in order to create federal jurisdiction. In terms of the statute, the California corporation acted improperly or collusively to invoke jurisdiction of the court. We stress the importance of a colorable or fictitious transfer to the meaning of these cases because in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 1928, 276 U.S. 518, 48 S. Ct. 404, 72 L.Ed. 681, a very similar case, the Court made an often-quoted statement to the effect that it would not inquire into the motives behind the particular transfer. In that case, the Court found that the transfer was actual inasmuch as the transferor corporation had been dissolved. Having made this finding, it said the existence of a motive to create diversity jurisdiction by the transfer was not fatal.

The cases involving reincorporation in another state are relevant insofar as they show that the Act of 1875 and its successors to 1948 prohibited colorable transfers effected for the purpose of invoking federal jurisdiction. More to the point are the collection-agent cases, for they prove conclusively that under pre-revision law the arrangements between Panama and

Kramer would not have invoked federal jurisdiction. The critical question for this Court, therefore, is whether Section 1359 of the 1948 Judicial Code changed the law. Although language in *Corabi v. Auto Racing, Inc.*, 3d Cir. 1959, 264 F.2d 784, and *City of Eufaula, Alabama v. Pappas*, M.D. Alabama 1963, 213 F. Supp. 749, may imply that the law has changed, the correct answer must be that the law is the same today as it was in 1881 when *Williams v. Nottawa* was decided. The Reviser's Notes indicate that Section 1359 was designed to eliminate some of the defects of the assignee clause, but they do not reflect any change of policy with respect to the Act of 1875 and its successor statutes. While it might be argued that the revised section places greater emphasis on the fact that its application is limited to improper or collusive arrangements, the Reviser's Notes do not suggest a legislative intent to narrow the effect of court decisions previously discussed. In *Fourco Glass Co. v. Transmirra Products Corp.*, 1957, 353 U.S. 222, 77 S.Ct. 787, 1 L.Ed.2d 786, the Supreme Court said that an alteration or condensation of a statute in 1948 did not change the law unless an intention to change was clearly expressed:

> Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such change is clearly expressed.

353 U.S., at 227, 77 S.Ct., at 790. This rule for interpreting the 1948 revision in light of pre-revision law was later reiterated by Justice Goldberg in Chambers. *United States v. FMC Corporation,* 1963, 84 S.Ct. 4, 7.

II.

Appellee's reliance is not really on the argument that Section 1359 changed the law but rather is on the proposition that both the old statutes and the revised version have very narrow application. He points especially to the implication of the *Black & White Taxicab* case, *supra,* that a motive to create federal jurisdiction by reincorporating in another state did not contravene the Act of 1875. As was stated previously, the Court made this statement after having found that the transfer from one corporation to another was real and absolute. While it is true that *Black & White Taxicab* presents a conceptual problem in that the same people no doubt controlled both the dissolved corporation and the newly created one, it must nevertheless be inferred from the opinion that a critical distinction is to be made between actual and colorable transfers. In the instant case, the assignment was colorable in the sense that it did not divest Panama of its interest in the lawsuit. To repeat, Mr. Kramer, the assignee, is nothing but a collection agent who was not involved in and is not knowledgeable about the events leading up to the lawsuit and who has no interest in it aside from his fee. The thrust of *Lehigh Mining* and other cases discussed to this point is that an assignment of this kind made

for the purpose of invoking federal jurisdiction is improper or collusive within the meaning of the statute.

Admittedly, we find some uncertainty in post-revision cases. In *Bradbury v. Dennis, supra,* for example, jurisdiction was sustained as against a contention that the assignment from an insolvent corporation to its nonresident sole stockholder was improper or collusive. Since the transfer was supported by adequate consideration and since there was nothing "surreptitious or fictitious" about it, the court felt that the proscription of Section 1359 was inapplicable. In *Steinberg v. Toro,* D. Puerto Rico 1951, 95 F. Supp. 791, on the other hand, the court dismissed for want of jurisdiction because it considered an assignment from a Puerto Rican corporation to its president, director, and stockholder in New York to be improper. The transaction was found to lack reality:

> . . .it must be concluded that neither the Corporation or the plaintiff ever intended or considered that the assignment, if made, operated so as to completely divest the Corporation of all interest in and power of control over the contract or any rights under it. And the close identity that exists between the plaintiff and the Corporation is likewise convincing that the Corporation has a residual power of control over the contract or any rights under it which is inconsistent with the idea of a real and absolute assignment thereof to the plaintiff.

95 F. Supp., at 797. The court concluded that Congress did not intend to confer jurisdiction on federal courts in cases where diversity of citizenship is achieved by pretense. These cases are more difficult than the instant case because each of them involved an assignee with an interest in the company for which he prosecuted a claim in federal court. In neither case could it be said that the assignee was a mere collection agent who had never even been informed about the nature of the controversy. Despite this distinction, however, *Bradbury v. Dennis* seems difficult to reconcile with pre-revision cases such as *Lehigh Mining*. In *Bradbury*, a Colorado corporation assigned its claims to its nonresident stockholder in order to create diversity; yet it does not appear that the corporation was dissolved or that it really divested itself of any interest in the claims.[3]

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[3] As we have suggested, in a situation where a corporation, without giving up its interest, assigns a claim to a stockholder in order to create diversity, the proscription of Section 1359 should apply. A case of this kind should be distinguished from cases in which there is no assignment or other device employed to create diversity and in which the party filing suit has a substantial interest. In *Matthies v. Seymour Mfg. Co.*, D. Conn. 1958, 23 F.R.D. 64, for example, the court overruled an objection to jurisdiction based on Section 1359 because it found that the nonresident plaintiff, as owner of contingent interests in the two trusts involved, had a substantial stake in the litigation. The fact that one of his relatives had a greater interest and had underwritten the costs of litigation was not deemed controlling. The court found no evidence that the plaintiff had actually surrendered control over the conduct of the suit. Similar reasoning was used to sustain jurisdiction in a later case decided by the same court. *See Allstate Ins. Co. v. Lumbermens Mut. Cas. Co.*, D. Conn. 1962, 204 F. Supp. 83.

In *Amar v. Garnier Enterprises, Inc.*, C. D. Calif. 1966, 41 F.R.D. 211, the court dismissed a stockholder's derivative suit on the ground that the plaintiff had been made a stockholder solely for the purpose of enabling him to bring a

While the assignment of a claim from corporation to non-resident stockholder presents a vexing problem, still more troublesome is the appointment of a foreign administrator or executor. In *Gorabi v. Auto Racing, Inc., supra,* it was conceded that the resident administratrix had resigned in favor of a nonresident administrator for the sole purpose of creating diversity. The court upheld jurisdiction, saying that it was not prohibited by Section 1359.[4] The case is troublesome because it is difficult to argue with the result despite the fact that the real party in interest appointed a nonresident administrator for the single reason that she wanted the case to be tried in federal court. The result is supported by the rule that the decree of a state probate court naming an administrator cannot be collaterally attacked because of the purposes and motives of the parties when they practiced no fraud upon the court. *Mecom v. Fitzsimmons Drilling Co.*, 1931, 284 U.S. 183, 52 S.Ct. 84, 76 L. Ed. 233. Since the *Mecom* case precluded a collateral attack in federal court on Mr. Corabi's appointment as administrator, the court had no basis for labeling

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diversity derivative suit. He knew nothing about the suit and would have had no control over it. This case and *Matthies v. Seymour Mfg. Co.* appear to be correctly decided. In each, the court determined whether there had been an improper or collusive arrangement to secure federal jurisdiction by asking whether the nominal plaintiff had a substantial interest in the lawsuit or was just a stand-in for some nondiverse party.

[4] Faced with almost identical facts, a number of courts have reached the same result as did the Third Circuit in *Corabi. See, e.g., Lang v. Elm City Construction Co.*, 2d Cir. 1963, 324 F.2d 235; *Todd County, Minn. v. Loegering*, 8th Cir. 1961, 297 F.2d 470; *Stephan v. Marlin Firearms Co.*, D. Conn. 1963, 217 F. Supp. 880.

that appointment as improper or collusive within the meaning of Section 1359.

Were it not for the court's discussion of the meaning of Section 1359, we would not dwell on the *Corabi* case but would simply distinguish it as involving an appointment immune from collateral attack. The problem is that the court defined "improper or collusive" so that the statute would have very narrow application, if any application at all:

> The statute uses the phrase "improperly or collusively" to characterize the manufacture or joinder prohibited by it. The word "collusion" is a strong one. The term "collusion" indicates "A secret agreement and cooperation for a fraudulent or deceitful purpose; deceit; fraud." Webster's New International Dictionary, 2 ed. . . . Certainly to make use of state law to obtain diversity jurisdiction even though the object may be a high verdict in federal court is not collusive within the ordinary meaning of that term. Moreover, the word "collusion" generally is employed to indicate an illegal agreement or understanding between opposing sides of a litigation rather than to an arrangement effected by one side of the sort at bar. Here the plaintiff's side of the case acted for what it deemed to be its own benefit and was opposed heartily by the other party to the litigation. The terms "improper" or "improperly", according to Webster's mean "Not

> suited to the circumstances, design, or end; not appropriate, fit, or congruous; as an *improper* medicine; *improper* dress." Webster gives as synonyms: "Improper, indecent, unseemly, indecorous, unbecoming, indelicate." The word "improperly" clearly connotes impropriety. We cannot perceive that here. Had Congress intended to prohibit the creation of federal diversity jurisdiction under such circumstances as those at bar it could have done so simply by omitting the words "improperly or collusively".

264 F.2d, at 788. By focusing on the literal meanings of the two words, the court virtually emasculated the statute; for it is doubtful that any of the cases under consideration reflect collusion in the sense of fraud or deceit, collusion with the opposing party, or impropriety in the sense of indecorum or indecency. Indeed, when litigants can achieve diversity by such simple devices as assignment to a nonresident collection agent or appointment of a nonresident administrator, it is hard to imagine why they would ever resort to fraud or deceit, actual impropriety, or collusion with the other side. If the statute is to have any utility, its meaning must be derived from the prerevision statutes and cases, not from dictionary definitions of the individual words. In the context of Section 1359 and its predecessor statutes, the phrase "improperly or collusively" means what the courts have said it means. Hence, an attempt to create

federal jurisdiction by colorable assignment or other device without substance is "improper or collusive" within the meaning of the statute. This principle is settled by prerevision cases and remains the law today.[5]

Like *Corabi, City of Eufaula, Alabama v. Pappas, supra,* evinces a restrictive view of Section 1359. In that case, the city instituted condemnation proceedings against a piece of land owned jointly by the members of a large family. The members who lived in Alabama transferred their interests to Zafero P. Paterson, the one member of the family who lived in another state. The consideration was $1.00, and it was conceded that the purpose of the transfer was to create diversity jurisdiction. Though there was no instrument requiring him to do so, it was understood that Paterson would share any sum he recovered in

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[5] Cases like *Corabi* have prompted Professor Wright to observe that Section 1359 "has been largely ineffective." Wright, *Federal Courts* § 31, at 86 (1963 ed.). To remedy this situation, the American Law Institute has proposed two new sections for the Judicial Code. One of these would attribute the same citizenship to an executor or administrator as the decedent, thus making it impossible to create diversity by appointment of a nonresident. ALI *Study of the Division of Jurisdiction Between State and Federal Courts* § 1301(b)(3) (April 1964 Draft). Section 1309(b) of the same Draft would clearly prohibit assignments or other transfers designed to create diversity jurisdiction:

> Whenever an object of a sale, assignment, or other transfer of the whole or any part of any interest in a claim or any other property has been to enable or to prevent the invoking of jurisdiction under this chapter or chapter 158 of this title, jurisdiction of a civil action shall be determined as if such sale, assignment or other transfer had not occurred. The word "transfer" as used in this section includes the appointment of a trustee, receiver, or other fiduciary, or of any other person to hold or receive interests of any kind, whether made by private persons or by a court or any other official body.

the suit with his transferors.[6] Despite the fact that he was clearly acting as the family's collection agent in federal court and had not received an absolute assignment of the other interests, the district court sustained jurisdiction, reasoning that a contract supported by $1.00 consideration is valid under Alabama law and that the motive to create federal jurisdiction is immaterial. We are unable to distinguish this case from the one before us, but we choose not to follow it. The assignment was colorable in the sense that it did not divest the assignors of their interests in the lawsuit, and it was made for the purpose of creating diversity. In our opinion, the decision upholding jurisdiction under these circumstances represents an unjustified departure from pre-revision cases decided by the Supreme Court and serves to undermine the historic policy of limiting diversity jurisdiction.[7]

As we are firmly convinced that the court below had no jurisdiction over the subject matter, we need

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[6] There appears to be no material distinction between this case and the instant case, but there is the minor distinction that Paterson did not execute a separate instrument stating that each member of the family would share in the recovery to the extent of his interest in the land. The parties simply had an understanding to this effect. The question arises whether we would decide the instant case differently if Kramer had not executed the instrument of reassignment. If it still appeared from all the facts that he was merely a collection agent and that the assignment was not real and absolute, then the result would, of course, be the same.

[7] In *Ferrara v. Philadelphia Laboratories, Inc.*, D. Vermont 1967, 272 F. Supp. 1000, a case involving an assignment of personal-injury claims to a nonresident trustee for the purpose of creating diversity, Judge Leddy discusses in a very thorough fashion the same decisions we have discussed in relation to Section 1359 and reaches substantially the same conclusions about them. The motion to dismiss for want of jurisdiction was granted.

not proceed to the merits of the controversy. The judgment of the district court is REVERSED and the cause REMANDED to that court with directions to dismiss for want of jurisdiction.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24090

D. C. Docket No. CA 3-1168

CARIBBEAN MILLS, INC.,

Appellant,

versus

CLAYTON S. KRAMER,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and BELL and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court with directions to dismiss for want of jurisdiction in accordance with the opinion of this Court.

It is further ordered and adjudged that the appellee, Clayton S. Kramer, be condemned to pay the costs of this cause

in this Court for which execution may be issued out of the said District Court.

January 26, 1968.

Court Costs:
Docketing cause, etc. . .$25.00
Cost of Printing
Record 1455.00
Total $1480.00

Issued as Mandate:
MAR 13 1968

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SUPREME COURT, U. S.

FILED
JUN 3 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 156

CLAYTON S. KRAMER,
Petitioner,

v.

CARIBBEAN MILLS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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6 Tex. Jur. 2d 460 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

CLAYTON S. KRAMER,

Petitioner,

v.

CARIBBEAN MILLS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Clayton S. Kramer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 26, 1968.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 26, 1968. A timely petition

for rehearing *en banc* was denied on March 5, 1968, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal diversity jurisdiction can be created by a lawful assignment of a money claim to a plaintiff.

2. Whether the assignment of a money claim is "improper" or "collusive" within the meaning of 28 U.S.C. § 1359 where (a) the assignment is legal under state law and (b) the motive for the assignment is to gain access to the federal court by creating diversity of citizenship.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1359. Parties collusively joined or made

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

STATEMENT OF THE CASE

A dispute arose between two alien corporations: (1) Caribbean Mills, Inc., the respondent herein, incorporated under the laws of Haiti, and (2) Panama and Venezuela Finance Co., incorporated under the laws of Panama. The dispute concerned a written agreement between the two corporations, dated June 4, 1959, under which Caribbean Mills agreed to pay Panama and Venezuela Finance Co. and/or one Roy Kelly the sum of $250,000 relative to certain stock transfers. Of that amount, $85,000 was to be paid at the closing of the agreement and the remaining $165,000 was to be paid in twelve designated installments.

The initial payment of $85,000 was duly made, but for reasons that are disputed but not now relevant, Caribbean Mills refused to make any of the installment payments on the remaining $165,000 obligation, despite repeated demands

by Panama and Venezuela Finance Co. The first of these unpaid installments had become due on June 1, 1962. In the instant action, the District Court found that these payments had been wrongfully withheld and, after submitting various special issues to a jury, granted judgment against Caribbean Mills in the amount of $165,000, plus interest and costs. R. 536-537.

The plaintiff in this proceeding, and the petitioner herein, was Clayton S. Kramer, an attorney in Wichita Falls, Texas. He became the plaintiff by virtue of an assignment to him on September 21, 1964, of all of the rights, titles and causes of action that Panama and Venezuela Finance Co. had with respect to the 1959 agreement. R. 438-440. This assignment read as follows:

> Assignment.
>
> Know All Men By These Presents:
>
> That we, the undersigned Panama and Venezuela Finance Company, a Panamanian Corporation, for and in consideration of One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, does hereby assign, sell and convey to Clayton S. Kramer of Wichita Falls, Wichita County, Texas, all of our right, title and interest, including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, monies due and/or to become due, arising from or out of a certain agreement and contract in writing, dated June 4, 1959, between Caribbean Mills, Inc., a Haitian Corporation, Roy B. Kelly of Washington, D.C. and Panama and Venezuela Finance Company, under which contract or agreement Caribbean Mills agreed to pay to Panama and Venezuela Finance Company and/or Roy B. Kelly the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) on such terms and at such times as were more fully set out in said instrument, a copy of which is attached hereto as Exhibit A, and fully incorporated herein by reference. This assignment specifically includes another certain agreement, made

in connection with the original agreement heretofore described, such other agreement being a collateral agreement and contract of Murchison Brothers and others, dated on or about June 4, 1959, a copy of such agreement is also attached hereto as Exhibit B, and fully incorporated herein by reference.

Panama and Venezuela Finance Company warrants to Assignee herein that it is the owner of and entitled to all benefits arising by virtue of the agreements and/or contracts herein assigned and has the right to make this assignment of the same.

It is agreed that this assignment to the said Clayton S. Kramer is made under the laws of the State of Texas, and in the event that there is any question of validity of such assignment, it shall be construed and governed by the laws of the State of Texas, and the powers, duties and benefits flowing hereunder to the said Clayton S. Kramer shall be controlled by the laws of the State of Texas.

That I, the undersigned officer of Panama and Venezuela Finance Company am specifically authorized and empowered to make such assignments to Clayton S. Kramer and such contract for Panama and Venezuela Finance Company herein.

Made and executed on this the 21st day of Sept., A.D. 1964.

PANAMA AND VENEZUELA
FINANCE COMPANY,
By E. ALFARO

Simultaneously with the execution of the foregoing assignment, the petitioner and Panama and Venezuela Finance Company entered into a separate agreement (Def. Ex. 4) reading as follows:

AGREEMENT

STATE OF TEXAS
COUNTY OF WICHITA:

KNOW ALL MEN BY THESE PRESENTS: That we, Panama and Venezuela Finance Company, a Pana-

manian corporation, and Clayton S. Kramer, do hereby agree and contract as follows:

WHEREAS, previously the Panama and Venezuela Finance Company, for valuable consideration, by instrument in writing, irrevocably assigned, sold and conveyed to Clayton S. Kramer all of its right, title and interest under and arising out of a certain contract or agreement closed June 4, 1959, between Panama and Venezuela Finance Company, Caribbean Mills, Inc., and Roy B. Kelly, together with an assignment of a connected agreement dated on or about June 4, 1959, from Murchison Brothers and others; and,

WHEREAS, the said Clayton S. Kramer is now the sole owner of any action or causes of action derivative therefrom, with the independent right of management, control and prosecution thereof, and does hereby indemnify and hold harmless the Panama and Venezuela Finance Company from any cost or expense that has or may arise out of the prosecution of any demand or suit on said contracts; and,

WHEREAS, the said Clayton S. Kramer agreed to make demand on said contracts and collect or prosecute to final Judgment all claims thereon; it is hereby collaterally Agreed, that in the event of payment to or recovery on said contracts by Clayton S. Kramer, he will pay solely as a Bonus to Panama and Venezuela Finance Company, or anyone properly designated by it in writing, a sum equal to 95 per cent of the net proceeds or monies obtained from Caribbean Mills, Inc., or others, under or by virtue of the contracts heretofore assigned to the said Clayton S. Kramer, it being understood by the parties hereto, that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such attorneys an amount not to exceed thirty-three and one-third per cent (33 1/3%) of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half (1/2) the total of such expenses. In other words, after the payment of attorney fees and expenses,

Clayton S. Kramer is to pay to Panama and Venezuela Finance Company or its order, ninety-five (95) per cent of the remainder of the net recovery, if any, and retain five (5) per cent for his own use and benefit.

This contract and agreement by and between the parties hereto is made and is to be performed in the State of Texas; that the same was drawn by the parties with reference to the laws of the State of Texas, and it is hereby specifically contracted and agreed that in the event of any controversy, dispute or litigation relating to or arising out of this instrument, the laws of the State of Texas specifically control. In consideration of our mutual promise and consideration with which this instrument passes, we set our hands hereunto on this the 21st day of Sept. A.D. 1964.

/s/ Clayton S. Kramer
Clayton S. Kramer

PANAMA & VENEZUELA
FINANCE COMPANY

As a result of the foregoing instruments, the petitioner Kramer as a resident and citizen of Texas brought the instant action in a federal court in the Northern District of Texas. The defendant Caribbean Mills was named as a foreign corporation, organized and existing under the laws of Haiti. Over its objections, the corporation was found by the District Court to be doing sufficient business in the Northern District of Texas to permit service of process in that district. R. 381-382.

The $165,000 judgment rendered by the District Court in petitioner's favor was reversed by the Court of Appeals on the sole ground that diversity jurisdiction was lacking over the subject matter. The Court of Appeals held, in short, that by virtue of 28 U.S.C. § 1359 an assignee for collection purposes cannot properly invoke federal diversity jurisdiction, at least where the assignment "was made for the purpose of creating federal jurisdiction without divesting the

assignor of his interest in the law suit." See p. 4 of Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of 28 U.S.C. § 1359.

Section 1359 of Title 28 provides that a federal court shall have no jurisdiction of a civil action "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

In reliance upon what it conceived to be the principles established before the 1948 revision of this statute, the Fifth Circuit has here held that "impropriety" or "collusiveness" within the meaning of § 1359 includes something less than "fraud or deceit, actual impropriety, or collusion with the other side." See p. 15 of Appendix hereto. It also means, said the court, "an attempt to create federal jurisdiction by colorable assignment or other device without substance." See pp. 15-16 of Appendix hereto.

In so holding, the Fifth Circuit conceded that its interpretation of § 1359 conflicts with that adopted by the Third Circuit in *Corabi v. Auto Racing, Inc.*, 264 F.2d 784, 788. Charging that the Third Circuit had "virtually emasculated the statute" by "focusing on the literal meanings of the two words" (See p. 15 of Appendix hereto), the Fifth Circuit declined to follow the Third Circuit's reading of "collusion" as indicating only a secret agreement for a fraudulent or deceitful purpose or of "improper" as meaning no more than some sort of impropriety.

The Fifth Circuit here could find no "collusion" or "impropriety" in the *Corabi* sense, for there was no secret collusion between the petitioner and the respondent, nor was there any legal impropriety in the assignment to petitioner of the Panama and Venezuela Finance Company claims.

That assignment was plainly lawful under relevant Texas law.[1] Moreover, such a legal assignment for purposes of collection made the petitioner the real party in interest under Rule 17(a), F.R.C.P., for purposes of prosecuting this action. 3A Moore's Federal Practice, Sec. 17.09, p.271 (1967); *Dixie Portland Flour Mills, Inc. v. Dixie Feed & Seed Co.*, 272 F.Supp. 826, 830 (W.D.Teun.).

The most that the Fifth Circuit could say was that this lawful assignment was "colorable in the sense that it did not divest the assignors of their interests in the lawsuit, and it was made for the purpose of creating diversity."[2] Appendix, p. 17, *infra.* But that makes the conflict with *Corabi* more complete. While *Corabi* was concerned not with an assignment of a money claim but with the appointment of a nonresident administrator of an estate, the appointment there was for the express purpose of creating diversity of citizenship between the parties. And even with that purpose established, the Third Circuit held that there was no collusion or impropriety within the scope of § 1359. Thus the conflict between the decision below and *Corabi* is complete.

Moreover, the Fifth Circuit found the Tenth Circuit's decision in *Bradbury v. Dennis*, 310 F.2d 73, "difficult to

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[1] The record discloses that, as consideration for the assignment, the petitioner Kramer (a) paid $1.00 in cash, (b) agreed to indemnify and hold harmless the Panama and Venezuela Finance Company from any sums of money it might owe or become obligated to pay as a result of efforts to enforce the 1959 agreement in question, and (c) promised performance of certain services, i.e., accepting the assignment and assuming the management, control and burden of any action taken to enforce the contract.

[2] Had the suit been brought by the Panama and Venezuela Finance Company, a Panama corporation, there would have been no federal jurisdiction. A federal court has no jurisdiction of a suit between two alien corporations where no federal question is involved. *Montalet v. Murray*, 4 Cranch 46. But the diversity statute, 28 U.S.C. § 1332, does extend federal jurisdiction to suits between a citizen of a State and a citizen or subject of a foreign country. Petitioner, as a citizen of Texas, could thus invoke federal jurisdiction in suing a corporation of Haiti, provided more than $10,000 was in controversy.

reconcile with pre-revision cases" upon which the Fifth Circuit had relied. See p. 12 of Appendix hereto. *Bradbury* is indeed difficult to reconcile with the decision below, for *Bradbury* held that § 1359 does not defeat an attempt to create diversity jurisdiction through a claim assignment supported by adequate consideration and operating to the prejudice of no one.[3] Such an assignment, indistinguishable from the instant one in its legal base, was held not to constitute collusion or impropriety for § 1359 purposes.

The Eighth Circuit has followed the lead of the Third and Tenth Circuits in interpreting § 1359 in a manner inconsistent with the reading of the court below. See, e.g., the Eighth Circuit's rulings in *McCoy v. Blakely*, 217 F.2d 227, 230; and *County of Todd, Minn. v. Loegering*, 297 F.2d 470, 473, holding that the appointments of non-resident administrators and trustees for "the sole purpose of creating diversity" are not in contravention of the policy or language of § 1359. See also *City of Eufaula, Alabama v. Pappas*, 213 F.Supp. 749 (M.D. Ala.) holding that the transfer of land interests to an out-of-state family member, for which $1.00 consideration was paid, for the purpose of creating diversity jurisdiction was not violative of § 1359; the Fifth Circuit in its opinion below found itself "unable to distinguish this case from the one before us, but we choose not to follow it." Appendix, p. 17, *infra*.

These conflicts justify the grant of certiorari to review the judgment below.

Under Texas law, "an Assignee [i.e., Kramer] of a chose in action may maintain an action against the obligor [i.e., Caribbean Mills], even though he paid no consideration for the assignment." 6 Tex. Jur. 2d 460. See also *Hughes v. Dopson*, 135 S.W.2d 148, 149-150 (Tex. Civ. App.), holding that an assignee of notes can maintain suit thereon "regardless of the amount of consideration paid by him, or, in fact, whether or not he had paid anything at all as consideration therefor."

[3] This point was reaffirmed by the Tenth Circuit in a subsequent appeal in the same case. *Bradbury v. Dennis*, 368 F.2d 905, 907.

2. The Decision Below Raises Significant and Recurring Problems Concerning Efforts To Invoke and Create Federal Diversity Jurisdiction.

The Fifth Circuit's opinion in this case reflects important statutory and policy considerations growing out of bona fide efforts to invoke and create federal diversity jurisdiction. And particularly since this Court has not had occasion to address itself to these matters since the 1948 revision of § 1359, there are compelling reasons why some definitive guidelines in the application of § 1359 should now be marked by this Court. Efforts to create federal jurisdiction are of common if not increasing occurrences, and both litigants and lower courts urgently need the assistance of this Court in understanding the policies and the language of § 1359. Among the unanswered questions thus posed are:

(1) Is § 1359 to be interpreted according to the plain meaning of its "collusive" and "improper" terminology, as the Third Circuit did in *Corabi*, or are those words to be ignored in favor of effectuating what some believe to be the desirable policy of foreclosing diversity jurisdiction to all who seek by lawful means to create it?

It has often been assumed that § 1359 as now written "has served to bar jurisdiction based on assignments which are solely for collection or otherwise no more than colorable."[4] But that assumption is undermined by the recognized fact that § 1359 has been rendered "largely ineffective" in barring jurisdiction based on such assignments by the uniform line of decisions, epitomized by *Corabi*, "that a party's actions are not 'improper' or 'collusive' within the meaning of the statute, even though the sole motive was to gain

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[4] A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts, Proposed Final Draft No. 1 (April 19, 1965), Commentary § 1307, p. 101.

access to federal court, if the actions were lawful in themselves."[5]

(2) To what extent is the motive of creating diversity relevant to the application of the § 1359 proscription? In dealing with the legislative predecessors of § 1359, this Court has seemingly given inconsistent answers to the importance to be attached to such a motive. In *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, *Williams v. Nottawa*, 104 U.S. 209, and *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 211 U.S. 293—all relied upon by the Fifth Circuit in this case—the Court held that corporate transfers for the purpose of creating federal jurisdiction could not be recognized. But those decisions were distinguished in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 524, and the rule was established that where the transfer is legal and actual, not feigned, "courts will not inquire into motives when deciding concerning their jurisdiction. . . . It is enough that respondent is the real party in interest." See also *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183; *City of Chicago v. Mills*, 204 U.S. 321; *Blair v. City of Chicago*, 201 U.S. 400.

Both the Third Circuit in *Corabi* and the Fifth Circuit in this case recognized these two conflicting lines of decision by this Court and sought to reconcile them—with differing results. Obviously, the time has come for this Court to treat the motive problem definitively and in the light of § 1359, the modern version of the statutory policy that concerned the Court in these earlier cases.

(3) To what extent should a desire to restrict federal diversity jurisdiction affect the interpretation and application of § 1359? Plainly, the Fifth Circuit here felt that "the historic policy of limiting diversity jurisdiction" (Appendix, p. 17, *infra*) justified its broad reading of § 1359. On the

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[5] Wright, Federal Courts, § 31, p. 86 (1963). In this case, of course, the assignment was lawful under Texas law; it was considered improper by the Fifth Circuit only because of the motive to create jurisdiction.

other hand, the Third Circuit in *Corabi*, 264 F.2d at 788, felt that to achieve the policy result here reached by the Fifth Circuit would require a legislative change: "Had Congress intended to prohibit the creation of federal diversity jurisdiction under such circumstances as those at bar it could have done so simply by omitting the words 'improperly or collusively' . . . . it would be improper for that change to emanate from this court." Such a deep division over the policy that the federal courts can legitimately achieve in applying § 1359, needs attention and resolution by this Court.

Finally, it should be noted that the practice of utilizing legitimate devices for creating federal diversity jurisdiction is a universal and widespread one. A study conducted by the American Law Institute of the diversity actions brought in the federal court in Philadelphia has indicated that approximately 20% of those actions were instituted by out-of-state fiduciaries, apparently handpicked to create the necessary diversity.[6] Such common practices underscore the desirability of a thorough reexamination of the problem by this Court so that litigants and lower courts may properly gauge what is legitimate and illegitimate under § 1359.

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[6] A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft (Sept. 25, 1965), Pt. I, App. B, 170, 175.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Counsel for Petitioner

June 3, 1968

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24090

CARIBBEAN MILLS, INC.,
Appellant,

versus

CLAYTON S. KRAMER,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(January 26, 1968.)

Before BROWN, Chief Judge, and BELL and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: Because we conclude that the requisite diversity of citizenship does not exist in this case, it will not be necessary to recite the facts in great detail. Appellant, Caribbean Mills, Inc., is a foreign corporation organized under the laws of Haiti where it operates a flour mill. On May 30, 1959, it entered into a written agreement with a man named Kelly from Washington, D.C. and the Panama and Venezuela Finance Company, a for-

eign corporation organized under the laws of Panama. Under the terms of the agreement, appellant was to purchase from Panama 125 shares of corporate stock for a down payment of $85,000 plus installment payments amounting to an additional $165,000. Because of subsequent developments and appellant's interpretation of the contract in light of these developments, the installment payments were never made.

On September 21, 1964, Panama and Kelly assigned their interests under the 1959 contract to Clayton Kramer, an attorney in Wichita Falls, Texas and appellee here. The consideration was $1.00. By separate instrument executed on the same day, Mr. Kramer reassigned 95% of his newly acquired interest to Panama.[1] Thereafter, he filed suit against Caribbean Mills for $165,000 in the United States District Court for the Northern District of Texas.[2] The trial judge overruled appellant's motion to dismiss on jurisdictional grounds and proceeded to trial. The question of contract interpretation was submitted to a jury, which returned a verdict in favor of appellee for $165,000. In appealing the judgment entered on this verdict, Caribbean Mills urges, *inter alia*, that the sole purpose of the assignment from Panama to Kramer was to create diversity of citizenship under 28 U.S.C. § 1332 (a)(2) (suit between citizen of

[1] Under the second instrument, Kramer had the right to pay his attorney 33-1/3% of any recovery. He was to retain 5% of the remainder and pay Panama 95% as a "bonus."

[2] There is no question that appellant had sufficient business contacts in Dallas, Texas to render itself amenable to process in the Northern District.

a state and citizen of a foreign state) and that such a tactic brings into play 28 U.S.C. § 1359, which says that a federal court shall not have jurisdiction where a party "by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." On oral argument before this Court, counsel for appellee made no particular effort to deny that Mr. Kramer is simply an assignee for purposes of collecting Panama's claim in federal court, but he argued that the assignment from Panama is valid on its face and that under the decided cases the motives for making it are of no import. Because we believe that 28 U.S.C. § 1359 has more force than appellee is willing to admit, we must reverse and remand with directions to dismiss for want of jurisdiction. While it may seem wasteful to divest the federal courts of jurisdiction after judgment has been entered on a jury verdict, there are deeper considerations which compel this result. In construing the very statute before us, the Tenth Circuit said,

> But, after all, it is the words of a federal statute we construe in the context of an historical purpose to deny diversity jurisdiction when it would operate to serve a purpose which is unsuited to the good order of federal court administration.

Bradbury v. Dennis, 10th Cir. 1962, 310 F.2d 73, 76.

I.

By assigning its interest under the contract and obtaining a reassignment of 95% of that interest on the same day, Panama obviously intended to designate Kramer as a collection agent with the capacity to sue in federal court. To construe these transactions in another way would require serious departure from any traditional notion of reality. The question presented, then, is whether under Section 1359 an assignee for collection purposes can properly invoke federal jurisdiction. In our view, he cannot do so because the assignment to him was made for the purpose of creating federal jurisdiction without divesting the assignor of his interest in the law suit. To support this conclusion, we must delve into the history of Section 1359 and some of the old cases.

Broadly speaking, Section 11 of the Judiciary Act of 1789 denied federal jurisdiction to an assignee of a cause of action if it was unavailable to his assignor, *i.e.*, if his assignor could not have brought the same suit in federal court. With changes in language, the "assignee clause" remained a part of the law until 1948. Wright, *Federal Courts* § 31, at 85 (1963 ed.). Section 37 of the Judicial Code of 1911, which stemmed from the Act of 1875, commanded the dismissal or remand of an original or removed action when the parties had been "improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable." 3 J. Moore, *Federal Practice* ¶ 17.05, at 1319 (1967 ed.).

In the 1948 Judicial Code, the Reviser condensed these two sections into Section 1359, the statute we have today. The Reviser's Notes indicate that the purpose of condensing the two sections into one was twofold: To eliminate confusing and unnecessary exceptions to the assignee clause and to eliminate the effect of that clause on bona fide assignees. Under the original clause, a bona fide assignee could not sue in federal court unless his assignor could have; under Section 1359, any assignee can sue in federal court so long as he was not improperly or collusively made a party in order to invoke federal jurisdiction. The Reviser's Notes do not suggest any other change in law or policy.

With this legislative background in mind, we turn to the pre-revision cases. These cases clearly reveal that the device employed by Panama would not have passed muster under pre-revision statutes. *Williams v. Nottawa*, 1881, 104 U.S. 209, 26 L.Ed. 719, involved an action against a township upon township bonds payable to bearer. Williams, the plaintiff, sued on three of the bonds as owner; but the rest of them had been transferred to him for collection purposes by citizens of Michigan, the state in which the township was located. The Supreme Court held that the transfer was colorable in the sense that it was never intended to change the ownership and was made only for the purpose of "creating a cause cognizable in the courts of the United States." The suit was therefore dismissed as being in contravention of the policy of the Act of 1875. The Reviser's Notes do not indicate

that the policy of dismissing under these circumstances was changed by the enactment of Section 1359.

Two later cases following *Williams v. Nottawa* lend further support to the principle that a federal court has no jurisdiction over an action brought by a collection agent to whom an assignment or transfer has been made for the purpose of creating diversity. In *Southern Realty Investment Co. v. Walker*, 1909, 211 U.S. 603, 29 S.Ct. 211, 53 L.Ed. 346, some Georgia attorneys had created a dummy corporation in South Dakota that was used as an agent to collect the claims of Georgia citizens against Georgia citizens in federal court. The Supreme Court held that under the Act of 1875 a diversity suit could not be maintained by the corporation in behalf of Georgia citizens. In *Central Paper Co. v. Southwick*, 6th Cir. 1932, 56 F.2d 593, Southwick had been assigned four claims for $1.00 each so that he could bring suit in federal court. He, like Mr. Kramer in the case at bar, appears to have arranged a fee for his efforts to collect. While it is not clear from the opinion that the reason for the assignments was to create diversity of citizenship, the court observed that the Act of 1875 and cases like *Williams v. Nottawa* prohibited "assignments of the technical legal titles to claims to plaintiffs for the purpose of permitting them to bring suits in federal courts for the purpose of collecting the same." 56 F. 2d, at 596. It found the four assignments to be colorable or fictitious and hence improperly made to invoke federal jurisdiction.

The three cases just discussed are factually similar to the instant case and serve to demonstrate that courts interpreting the Act of 1875 considered an assignment for the purpose of enabling collection in federal court to be improper within the meaning of the statute. Three other cases, which are not so similar factually but perhaps more well-known, are illustrative of the same proposition. In *Lehigh Mining & Mfg. Co. v. Kelly*, 1895, 160 U.S. 327, 16 S.Ct. 307, 40 L.Ed. 444 and in *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 1908, 211 U.S. 293, 29 S.Ct. 111, 53 L.Ed. 189, stockholders of one corporation transferred fee title in land to a sham corporation in another state without valuable consideration for the purpose of creating federal jurisdiction. In *Miller & Lux*, the Court summarized the transaction as follows:

> . . . the transfer of the property of the California corporation to the Nevada corporation was merely formal,—only a device by which to have the rights asserted by the California corporation in a state court determined by the Federal court rather than by the state court. The agreement that all the property of the California corporation should be transferred to the Nevada corporation was attended by the condition that all the capital stock of the new corporation should be issued—and it was issued—to the California corporation, which remained in existence with full power, as the owner of such stock, to control the operations of the Nevada corporation.

211 U.S., at 304, 29 S.Ct., at 114. The Court held that the Nevada corporation was collusively made plaintiff in the suit for the purpose of creating federal jurisdiction and therefore that jurisdiction failed under the Act of 1875. The reason jurisdiction failed was not that the California corporation made a transfer with the motive of getting into federal court but rather that the transfer was colorable, indeed a sham, and was undertaken in order to create federal jurisdiction. In terms of the statute, the California corporation acted improperly or collusively to invoke jurisdiction of the court. We stress the importance of a colorable or fictitious transfer to the meaning of these cases because in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 1928, 276 U.S. 518, 48 S. Ct. 404, 72 L.Ed. 681, a very similar case, the Court made an often-quoted statement to the effect that it would not inquire into the motives behind the particular transfer. In that case, the Court found that the transfer was actual inasmuch as the transferor corporation had been dissolved. Having made this finding, it said the existence of a motive to create diversity jurisdiction by the transfer was not fatal.

The cases involving reincorporation in another state are relevant insofar as they show that the Act of 1875 and its successors to 1948 prohibited colorable transfers effected for the purpose of invoking federal jurisdiction. More to the point are the collection-agent cases, for they prove conclusively that under pre-revision law the arrangements between Panama and

Kramer would not have invoked federal jurisdiction. The critical question for this Court, therefore, is whether Section 1359 of the 1948 Judicial Code changed the law. Although language in *Corabi v. Auto Racing, Inc.*, 3d Cir. 1959, 264 F.2d 784, and *City of Eufaula, Alabama v. Pappas*, M.D. Alabama 1963, 213 F. Supp. 749, may imply that the law has changed, the correct answer must be that the law is the same today as it was in 1881 when *Williams v. Nottawa* was decided. The Reviser's Notes indicate that Section 1359 was designed to eliminate some of the defects of the assignee clause, but they do not reflect any change of policy with respect to the Act of 1875 and its successor statutes. While it might be argued that the revised section places greater emphasis on the fact that its application is limited to improper or collusive arrangements, the Reviser's Notes do not suggest a legislative intent to narrow the effect of court decisions previously discussed. In *Fourco Glass Co. v. Transmirra Products Corp.*, 1957, 353 U.S. 222, 77 S.Ct. 787, 1 L.Ed.2d 786, the Supreme Court said that an alteration or condensation of a statute in 1948 did not change the law unless an intention to change was clearly expressed:

> Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such change is clearly expressed.

353 U.S., at 227, 77 S.Ct., at 790. This rule for interpreting the 1948 revision in light of pre-revision law was later reiterated by Justice Goldberg in Chambers. *United States v. FMC Corporation*, 1963, 84 S.Ct. 4, 7.

II.

Appellee's reliance is not really on the argument that Section 1359 changed the law but rather is on the proposition that both the old statutes and the revised version have very narrow application. He points especially to the implication of the *Black & White Taxicab* case, *supra*, that a motive to create federal jurisdiction by reincorporating in another state did not contravene the Act of 1875. As was stated previously, the Court made this statement after having found that the transfer from one corporation to another was real and absolute. While it is true that *Black & White Taxicab* presents a conceptual problem in that the same people no doubt controlled both the dissolved corporation and the newly created one, it must nevertheless be inferred from the opinion that a critical distinction is to be made between actual and colorable transfers. In the instant case, the assignment was colorable in the sense that it did not divest Panama of its interest in the lawsuit. To repeat, Mr. Kramer, the assignee, is nothing but a collection agent who was not involved in and is not knowledgeable about the events leading up to the lawsuit and who has no interest in it aside from his fee. The thrust of *Lehigh Mining* and other cases discussed to this point is that an assignment of this kind made

for the purpose of invoking federal jurisdiction is improper or collusive within the meaning of the statute.

Admittedly, we find some uncertainty in post-revision cases. In *Bradbury v. Dennis, supra,* for example, jurisdiction was sustained as against a contention that the assignment from an insolvent corporation to its nonresident sole stockholder was improper or collusive. Since the transfer was supported by adequate consideration and since there was nothing "surreptitious or fictitious" about it, the court felt that the proscription of Section 1359 was inapplicable. In *Steinberg v. Toro,* D. Puerto Rico 1951, 95 F. Supp. 791, on the other hand, the court dismissed for want of jurisdiction because it considered an assignment from a Puerto Rican corporation to its president, director, and stockholder in New York to be improper. The transaction was found to lack reality:

> . . .it must be concluded that neither the Corporation or the plaintiff ever intended or considered that the assignment, if made, operated so as to completely divest the Corporation of all interest in and power of control over the contract or any rights under it. And the close identity that exists between the plaintiff and the Corporation is likewise convincing that the Corporation has a residual power of control over the contract or any rights under it which is inconsistent with the idea of a real and absolute assignment thereof to the plaintiff.

95 F. Supp., at 797. The court concluded that Congress did not intend to confer jurisdiction on federal courts in cases where diversity of citizenship is achieved by pretense. These cases are more difficult than the instant case because each of them involved an assignee with an interest in the company for which he prosecuted a claim in federal court. In neither case could it be said that the assignee was a mere collection agent who had never even been informed about the nature of the controversy. Despite this distinction, however, *Bradbury v. Dennis* seems difficult to reconcile with pre-revision cases such as *Lehigh Mining*. In *Bradbury*, a Colorado corporation assigned its claims to its nonresident stockholder in order to create diversity; yet it does not appear that the corporation was dissolved or that it really divested itself of any interest in the claims.[3]

[3] As we have suggested, in a situation where a corporation, without giving up its interest, assigns a claim to a stockholder in order to create diversity, the proscription of Section 1359 should apply. A case of this kind should be distinguished from cases in which there is no assignment or other device employed to create diversity and in which the party filing suit has a substantial interest. In *Matthies v. Seymour Mfg. Co.*, D. Conn. 1958, 23 F.R.D. 64, for example, the court overruled an objection to jurisdiction based on Section 1359 because it found that the nonresident plaintiff, as owner of contingent interests in the two trusts involved, had a substantial stake in the litigation. The fact that one of his relatives had a greater interest and had underwritten the costs of litigation was not deemed controlling. The court found no evidence that the plaintiff had actually surrendered control over the conduct of the suit. Similar reasoning was used to sustain jurisdiction in a later case decided by the same court. *See Allstate Ins. Co. v. Lumbermens Mut. Cas. Co.*, D. Conn. 1962, 204 F. Supp. 83.

In *Amar v. Garnier Enterprises, Inc.*, C. D. Calif. 1966, 41 F.R.D. 211, the court dismissed a stockholder's derivative suit on the ground that the plaintiff had been made a stockholder solely for the purpose of enabling him to bring a

While the assignment of a claim from corporation to non-resident stockholder presents a vexing problem, still more troublesome is the appointment of a foreign administrator or executor. In *Corabi v. Auto Racing, Inc., supra,* it was conceded that the resident administratrix had resigned in favor of a nonresident administrator for the sole purpose of creating diversity. The court upheld jurisdiction, saying that it was not prohibited by Section 1359.[4] The case is troublesome because it is difficult to argue with the result despite the fact that the real party in interest appointed a nonresident administrator for the single reason that she wanted the case to be tried in federal court. The result is supported by the rule that the decree of a state probate court naming an administrator cannot be collaterally attacked because of the purposes and motives of the parties when they practiced no fraud upon the court. *Mecom v. Fitzsimmons Drilling Co.*, 1931, 284 U.S. 183, 52 S.Ct. 84, 76 L. Ed. 233. Since the *Mecom* case precluded a collateral attack in federal court on Mr. Corabi's appointment as administrator, the court had no basis for labeling

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diversity derivative suit. He knew nothing about the suit and would have had no control over it. This case and *Matthies v. Seymour Mfg. Co.* appear to be correctly decided. In each, the court determined whether there had been an improper or collusive arrangement to secure federal jurisdiction by asking whether the nominal plaintiff had a substantial interest in the lawsuit or was just a stand-in for some nondiverse party.

[4] Faced with almost identical facts, a number of courts have reached the same result as did the Third Circuit in *Corabi. See, e.g., Lang v. Elm City Construction Co.*, 2d Cir. 1963, 324 F.2d 235; *Todd County, Minn. v. Loegering*, 8th Cir. 1961, 297 F.2d 470; *Stephan v. Marlin Firearms Co.*, D. Conn. 1963, 217 F. Supp. 880.

that appointment as improper or collusive within the meaning of Section 1359.

Were it not for the court's discussion of the meaning of Section 1359, we would not dwell on the *Corabi* case but would simply distinguish it as involving an appointment immune from collateral attack. The problem is that the court defined "improper or collusive" so that the statute would have very narrow application, if any application at all:

> The statute uses the phrase "improperly or collusively" to characterize the manufacture or joinder prohibited by it. The word "collusion" is a strong one. The term "collusion" indicates "A secret agreement and cooperation for a fraudulent or deceitful purpose; deceit; fraud." Webster's New International Dictionary, 2 ed. . . . Certainly to make use of state law to obtain diversity jurisdiction even though the object may be a high verdict in federal court is not collusive within the ordinary meaning of that term. Moreover, the word "collusion" generally is employed to indicate an illegal agreement or understanding between opposing sides of a litigation rather than to an arrangement effected by one side of the sort at bar. Here the plaintiff's side of the case acted for what it deemed to be its own benefit and was opposed heartily by the other party to the litigation. The terms "improper" or "improperly", according to Webster's mean "Not

> suited to the circumstances, design, or end; not appropriate, fit, or congruous; as an *improper* medicine; *improper* dress." Webster gives as synonyms: "Improper, indecent, unseemly, indecorous, unbecoming, indelicate." The word "improperly" clearly connotes impropriety. We cannot perceive that here. Had Congress intended to prohibit the creation of federal diversity jurisdiction under such circumstances as those at bar it could have done so simply by omitting the words "improperly or collusively".

264 F.2d, at 788. By focusing on the literal meanings of the two words, the court virtually emasculated the statute; for it is doubtful that any of the cases under consideration reflect collusion in the sense of fraud or deceit, collusion with the opposing party, or impropriety in the sense of indecorum or indecency. Indeed, when litigants can achieve diversity by such simple devices as assignment to a nonresident collection agent or appointment of a nonresident administrator, it is hard to imagine why they would ever resort to fraud or deceit, actual impropriety, or collusion with the other side. If the statute is to have any utility, its meaning must be derived from the prerevision statutes and cases, not from dictionary definitions of the individual words. In the context of Section 1359 and its predecessor statutes, the phrase "improperly or collusively" means what the courts have said it means. Hence, an attempt to create

federal jurisdiction by colorable assignment or other device without substance is "improper or collusive" within the meaning of the statute. This principle is settled by prerevision cases and remains the law today.[8]

Like *Corabi*, *City of Eufaula, Alabama v. Pappas*, *supra*, evinces a restrictive view of Section 1359. In that case, the city instituted condemnation proceedings against a piece of land owned jointly by the members of a large family. The members who lived in Alabama transferred their interests to Zafero P. Paterson, the one member of the family who lived in another state. The consideration was $1.00, and it was conceded that the purpose of the transfer was to create diversity jurisdiction. Though there was no instrument requiring him to do so, it was understood that Paterson would share any sum he recovered in

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[8] Cases like *Corabi* have prompted Professor Wright to observe that Section 1359 "has been largely ineffective." Wright, *Federal Courts* § 31, at 86 (1963 ed.). To remedy this situation, the American Law Institute has proposed two new sections for the Judicial Code. One of these would attribute the same citizenship to an executor or administrator as the decedent, thus making it impossible to create diversity by appointment of a nonresident. ALI *Study of the Division of Jurisdiction Between State and Federal Courts* § 1301(b)(3) (April 1964 Draft). Section 1309(b) of the same Draft would clearly prohibit assignments or other transfers designed to create diversity jurisdiction:

> Whenever an object of a sale, assignment, or other transfer of the whole or any part of any interest in a claim or any other property has been to enable or to prevent the invoking of jurisdiction under this chapter or chapter 158 of this title, jurisdiction of a civil action shall be determined as if such sale, assignment or other transfer had not occurred. The word "transfer" as used in this section includes the appointment of a trustee, receiver, or other fiduciary, or of any other person to hold or receive interests of any kind, whether made by private persons or by a court or any other official body.

the suit with his transferors.[6] Despite the fact that he was clearly acting as the family's collection agent in federal court and had not received an absolute assignment of the other interests, the district court sustained jurisdiction, reasoning that a contract supported by $1.00 consideration is valid under Alabama law and that the motive to create federal jurisdiction is immaterial. We are unable to distinguish this case from the one before us, but we choose not to follow it. The assignment was colorable in the sense that it did not divest the assignors of their interests in the lawsuit, and it was made for the purpose of creating diversity. In our opinion, the decision upholding jurisdiction under these circumstances represents an unjustified departure from pre-revision cases decided by the Supreme Court and serves to undermine the historic policy of limiting diversity jurisdiction.[7]

As we are firmly convinced that the court below had no jurisdiction over the subject matter, we need

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[6] There appears to be no material distinction between this case and the instant case, but there is the minor distinction that Paterson did not execute a separate instrument stating that each member of the family would share in the recovery to the extent of his interest in the land. The parties simply had an understanding to this effect. The question arises whether we would decide the instant case differently if Kramer had not executed the instrument of reassignment. If it still appeared from all the facts that he was merely a collection agent and that the assignment was not real and absolute, then the result would, of course, be the same.

[7] In *Ferrara v. Philadelphia Laboratories, Inc.*, D. Vermont 1967, 272 F. Supp. 1000, a case involving an assignment of personal-injury claims to a nonresident trustee for the purpose of creating diversity, Judge Leddy discusses in a very thorough fashion the same decisions we have discussed in relation to Section 1359 and reaches substantially the same conclusions about them. The motion to dismiss for want of jurisdiction was granted.

not proceed to the merits of the controversy. The judgment of the district court is REVERSED and the cause REMANDED to that court with directions to dismiss for want of jurisdiction.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24090

D. C. Docket No. CA 3-1168

CARIBBEAN MILLS, INC.,

Appellant,

versus

CLAYTON S. KRAMER,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and BELL and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court with directions to dismiss for want of jurisdiction in accordance with the opinion of this Court.

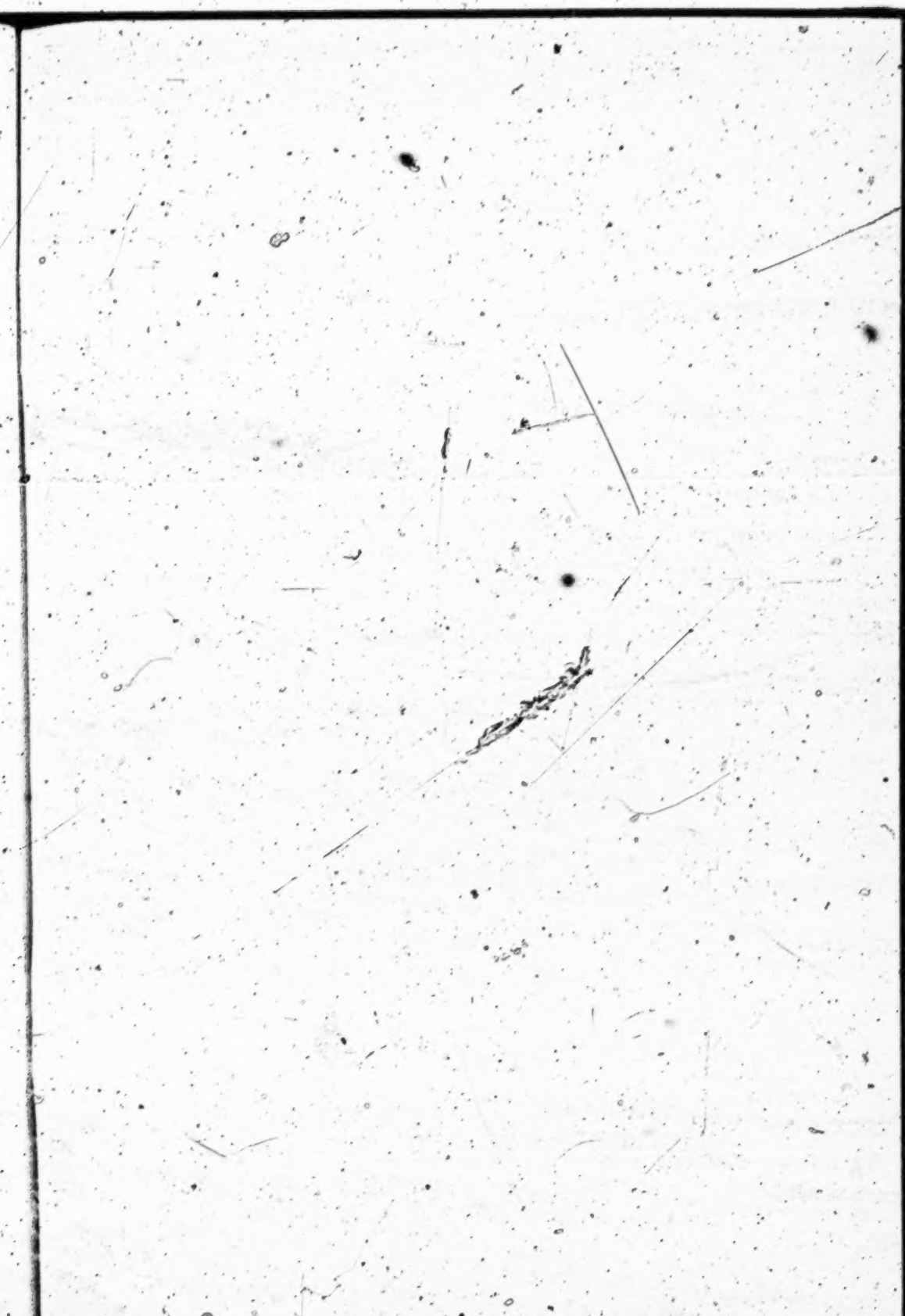
It is further ordered and adjudged that the appellee, Clayton S. Kramer, be condemned to pay the costs of this cause

in this Court for which execution may be issued out of the said District Court.

January 26, 1968.

Court Costs:
Docketing cause, etc. . . .$25.00
Cost of Printing
Record 1455.00
Total $1480.00

Issued as Mandate:
MAR 13 1968



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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 156

CLAYTON S. KRAMER, *Petitioner,*

v.

CARIBBEAN MILLS, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1494

CLAYTON S. KRAMER,

Petitioner,

v.

CARIBBEAN MILLS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 392 F. 2d 387. No written opinion was rendered by the United States District Court for the Northern District of Texas.

JURISDICTION

The date of the judgment and opinion sought to be reviewed by Clayton S. Kramer is January 26, 1968, and the time of their entry was January 26, 1968. A Motion for Rehearing En Banc was thereafter filed and was denied on March 5, 1968. Petitioner seeks to invoke the jurisdiction of this Court under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

The question presented is whether a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which held that under Title 28, United States Code, Section 1359, an assignee who is obligated to pay his assignor 95% of that which might be obtained, cannot properly invoke federal jurisdiction with regard to a dispute between two alien corporations who would not otherwise have access to federal court, when the assignment did not divest the assignor of its interest in the lawsuit, the assignee was not involved in and is not knowledgeable about the events leading up to the lawsuit, has no interest in the lawsuit aside from his fee and is nothing but a collection agent.

STATUTE INVOLVED

United States Code, Title 28:

§1359. Parties collusively joined or made.

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise,

has been improperly or collusively made or joined to invoke the jurisdiction of such court.

STATEMENT OF THE CASE

The Petitioner is correct when he states that a dispute arose between two alien corporations concerning a written agreement between Caribbean Mills, Inc., on the one hand, and Roy Kelly of Washington, D. C., and Panama and Venezuela Finance Company on the other hand. Caribbean Mills, Inc., is incorporated under the laws of the Republic of Haiti where it operates a flour mill near Port-au-Prince, Haiti (R. 99), and Panama and Venezuela Finance Company is incorporated under the laws of Panama. It is also correct that for reasons that are disputed, but which are not relevant to this Petition, Caribbean Mills, Inc., did not make any installment payments under the May 30, 1959, Agreement, which had a closing date of June 4, 1959. (hereinafter referred to as the "May 30, 1959 Agreement") The only facts which are relevant on the question of whether a Writ of Certiorari should issue are those facts which relate to whether or not the United States Court of Appeals for the Fifth Circuit was correct in holding that the trial court did not have jurisdiction because the Petitioner had been improperly or collusively made the Plaintiff to invoke the jurisdiction of the court.

The Petitioner, Clayton S. Kramer, is a Wichita Falls, Texas, attorney who learned of the May 30, 1959, Agreement, upon which the suit was based, in the summer of 1964 from Jack Banner, the attorney who represented him in the trial court (R. 60). Mr. Banner was briefing a legal point involving a cause of action and told Mr. Kramer that

there might be a claim which could be acquired on which he could make some money. Mr. Kramer knew that no payment had been made with respect to installment payments under the May 30, 1959, Agreement (R. 66), and knew that there was a possibility that suit would have to be filed (R. 81-82). Mr. Kramer has had no direct contact with Panama and Venezuela Finance Company (R. 90) and did not participate in, nor does he have any actual knowledge of, the transactions relating to the execution of the May 30, 1959, Agreement (R. 96), other than that information which was given to him by the attorney who represented him and arranged for him to obtain the "Assignment" (R. 69). The Petitioner has had no personal contact with, nor does he know any party to, the May 30, 1959, Agreement (R. 93-94). Mr. Kramer instituted this action against the Respondent, Caribbean Mills, Inc., on the basis of an "Assignment" to him from Panama and Venezuela Finance Company. Mr. Kramer was not able to identify the signature of any representative of Panama and Venezuela Company or testify that the "Assignment" had been executed. When suit was filed, Petitioner made reference to the "Assignment" from Panama and Venezuela Finance Company, which appears to be a complete assignment on its face, but did not disclose the existence of his obligation to return 95% of any amount which he might recover. During deposition the Petitioner refused to answer any questions relating to the consideration which he had paid for this cause of action or the terms of any other agreement which he had with Panama and Venezuela Finance Company. By filing a motion with the

Court to compel the Petitioner to answer questions concerning this transaction and resuming the deposition after the motion was sustained, it was learned that Petitioner, on the same day as the "Assignment", had executed and delivered an "Agreement" to Panama and Venezuela Finance Company which obligated him to pay the 95% of any amount that he received to Panama and Venezuela Finance Company. The Fifth Circuit found that the only consideration which Petitioner paid for the "Assignment" from Panama and Venezuela Finance Company was $1.00.

ARGUMENT

A Petition for Writ of Certiorari should not issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. The Court held in an opinion by Judge Thornberry that there was no jurisdiction over the subject matter in this action because the Petitioner was made a party in contravention of the provisions of Title 28, United States Code, Section 1359. Under the facts in this case, the decision of the Fifth Circuit in this action is correct, does not conflict with prior decisions of the Supreme Court of the United States, is not in direct conflict with the decisions of other United States Courts of Appeal, and does not present an important question for review by this Court in that the decision turns upon the facts in this particular action. It was the conclusion of the Court of Appeals that:

> "By assigning its interest under the contract and obtaining a reassignment of 95% of that interest on the same day, Panama obviously intended to designate Kramer as a collection agent with the capacity to sue in federal court. To construe these transactions in any

other way would require serious departure from any traditional notion of reality. The question presented, then, is whether under Section 1359 an assignee for collection purposes can properly invoke federal jurisdiction. In our view, he cannot do so because the assignment to him was made for the purpose of creating federal jurisdiction without divesting the assignor of his interest in the lawsuit".

In support of the above conclusion the Court then discussed the legislative history of Section 1359 and certain of the cases which have been decided under this section and preceding provisions, but in this discussion the Court again placed emphasis upon the fact that:

> "In the instant case, the assignment was colorable in the sense that it did not divest Panama of its interest in the lawsuit. To repeat, Mr. Kramer, the assignee, is nothing but a collection agent who was not involved in and is not knowledgeable about the events leading up to the lawsuit and who has no interest in it aside from his fee."

The decision of the United States Court of Appeals for the Fifth Circuit recognized that by virtue of Section 1359, where diversity jurisdiction does not exist, a colorable or fictious assignment of a cause of action which does not divest the assignor of ownership, does not create federal jurisdiction.

I.

THE DECISION IS CORRECT

The decision of the Court of Appeals is patently correct; indeed, a clearer case coming within the proscription of Section 1359 would be difficult to imagine. The Fifth Circuit discussed the legislative history of Title 28, United States Code, Section 1359, and gave the

reasons for the previous changes which have been made.[1] As the Court pointed out, "The Reviser's Notes indicate that the purpose of condensing the two sections into one was twofold: To eliminate confusing and unnecessary exceptions to the assignee clause and to eliminate the effect of that clause on bona fide assignees. Under the original clause, a bona fide assignee could not sue in federal court unless his assignor could have; under Section 1359, any assignee can sue in federal court so long as he was not improperly or collusively made a party in order to invoke federal jurisdiction. The Reviser's Notes do not suggest any other change in law or policy." The Court correctly held that with regard to colorable or fictitious transfers which do not divest the assignor of ownership the law was not changed by the revision of the 1948 Judicial Code.[2] After considering certain pre-revision cases decided under the previous statutory provisions, the Fifth Circuit stated that the device employed by Panama and Venezuela Finance Company in this action would not have been proper under

[1] The possibility of manufacturing diversity jurisdiction by assignment has been the subject of concern since the Judiciary Act of 1789 which denied jurisdiction to an assignee if it was unavailable to his assignor. Title 28, United States Code, Section 41(1) (1940) provided that the citizenship of both the assignor and assignee had to be diverse from that of the defendant in an action brought by an assignee, and Title 28, United States Code, Section 80 (1940), directed the dismissal when the parties had been improperly or collusively made or joined, for the purpose of creating jurisdiction. The "assignee clause" set forth in Title 28, United States Code, Section 41(1) (1940) was repealed, and Title 28, United States Code, Section 80 was modified to include assignments by the Judicial Code and Judiciary Revision Act of 1948, which resulted in the enactment of Title 28, United States Code, Section 1359 in its present form.

[2] The following comment appears in 3A Moore's Federal Practice, ¶17.06, at page 205: "The assignee clause was omitted from the Judicial Code and Judiciary Revision Act of 1948 due to the

(Continued on following page)

the statutes prior to revision. *Williams v. Nottawa*, 1881, 104 U. S. 209, 26 L. Ed. 719; *Lehigh Mining & Mfg. Co. v. Kelly*, 1895, 160 U. S. 327, 16 S. Ct. 307, 40 L. Ed. 444; *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 1908, 211 U. S. 293, 29 S. Ct. 111, 53 L. Ed. 189; *Southern Realty Investment Co. v. Walker*, 1909, 211 U. S. 603, 29 S. Ct. 211, 53 L. Ed. 346; *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 1928, 276 U. S. 518, 48 S. Ct. 404, 72 L. Ed. 681; and *Central Paper Co. v. Southwick*, 56 F. 2d 593 (C.C.A. 6, 1932).

The following language of this Court in *Lehigh Mining & Mfg. Co.*, supra, is applicable to and is authority for the decision in the present case:

> "* * * It is true that the technical legal title to the lands in controversy is, for the time, in the Pennsylvania corporation. It is also true that there was no formal agreement upon the part of that corporation 'as an artificial being, invisible, intangible, and existing only in contemplation of law,' that the title should ever be reconveyed to the Virginia corporation. But when the inquiry involves the jurisdiction of a Federal court,—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record (Grace v. American Cent. Ins. Co. 109, U. S.

(Continued from preceding page)
difficulty that had been encountered in construing it; because an assignee, holding under a bona fide assignment made without any intent to create federal jurisdiction, should in all cases be able to resort to the federal courts without regard to the citizenship of his assignor; and because any assignment made to create federal jurisdiction was properly prohibited by former §80; it now states expressly that an assignment cannot be used to create jurisdiction; and it is the only provision in the Revision Act which deals with assignment as a limitation upon jurisdiction. The old assignee clause was accordingly repealed."

278, 283 [27: 932, 934]; Bors v. Preston, 111 U. S. 252, 255 [28: 419, 420]); * * *"

"* * * Its scope and effect were determined in Williams v. Nottawa, 104 U. S. 209, 211 [26: 719, 720], and Morris v. Gilmer, 129 U. S. 315 [32: 690]. In the first of those cases the court, referring to the act of 1875, said: 'In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and made it the duty of the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction.'"

"* * * If this action were not declared collusive, within the meaning of the act of 1875, then the provision making it the duty of the circuit court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the circuit courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance."

The similarity of the facts in *Central Paper Co.*, supra, with the facts in the present case as they relate to an assignment made for the purpose of creating fictitious jurisdiction, makes the following language in that Opinion pertinent:

"Even before the enactment of the above act, a plaintiff holding the technical legal title, only, under a pretended or simulated assignment, conveyance, or transfer, could not maintain an action in the federal courts, Barney v. Baltimore City, 6 Wall. 280, 288, 18 L. Ed. 825 (1867), and it has been emphasized

since the passage of that act that such colorable assignments, conveyances, and transfers are a fraud upon the courts, and that they will not entertain jurisdiction as to them. Coming within this category are assignments of the technical legal titles to claims to plaintiffs for the purpose of permitting them to bring suits in the federal courts for the purpose of collecting the same. This is settled by many authorities. Williams v. Nottawa, 104 U. S. 209, 26 L. Ed. 719; Bernards Township v. Stebbins, 109 U. S. 341, 353, 3 S. Ct. 252, 27 L. Ed. 956; Farmington v. Pillsbury, 114 U. S. 138, 5 S. Ct. 807, 29 L. Ed. 114; Lake County Commissioners v. Dudley, 173 U. S. 243, 250, 19 S. Ct. 398, 43 L. Ed. 684; Waite v. Santa Cruz, 184 U. S. 302, 324, 22 S. Ct. 327, 46 L. Ed. 552; and Woodside v. Beckham, 216 U. S. 117, 30 S. Ct. 367, 54 L. Ed. 408.

"* * * Concerning the claim of Johnson & Carlson it appears that Southwick paid no money (except $1) for the assignment, and that he was to pay more only if he collected the money. As to the claim of Isaacson, the latter's own testimony was that he turned the claim over to Southwick for collection, and that he was to be paid if Southwick was able to collect it. As to Lamppa, the latter's testimony was that Southwick promised to pay him in full for his wood when he collected it; that perhaps he was to deduct something for his services for making the collection; but nothing had been said as to the exact amount of the fees. As to the claim of Sillanpaa, it appears that Southwick paid the sum of $1 for the technical assignment of the legal title; that it was turned over to him so that the assignor could get something out of the case; and that Sillanpaa would get the rest of the money if Southwick was able to collect it.

"This, in summary, is the testimony of the assignors, and the testimony of Southwick is not to the contrary. The effect of his testimony is that he was the holder of the technical legal title to these claims."

> "We are satisfied that, within the principle of the above decisions, these four assignments to him were colorable only, and that he held the bare legal title, for which he had paid the sum of $1, and that the assignments were made to him for the purpose of creating a case of fictitious jurisdiction, in contravention of the statute. In our opinion the trial court erred in not dismissing these claims without prejudice for want of jurisdiction as to them."

It is clear that the decision of the court below is correct.

II.

THERE IS NO CONFLICT

The Petitioner argues that a Writ of Certiorari should be granted by virtue of the contention that the decision below conflicts with the decisions of other Courts of Appeals, referring to *Bradbury v. Dennis*, 310 F. 2d 73 (C.C.A. 10, 1962), *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (C.C.A. 3, 1959), *McCoy v. Blakely*, 217 F. 2d 227 (C.C.A. 8, 1954), *County of Todd, Minn. v. Loegering*, 297 F. 2d 470 (C.C.A. 8, 1961), and *City of Eufaula, Alabama v. Pappas*, 213 F. Supp. 749 (M.D. Ala., 1963). A careful reading of these cases in the light of the facts in the instant case shows clearly that there is no real conflict present. Although the court found *Bradbury v. Dennis*, supra, difficult to reconcile with pre-revision cases such as *Lehigh Mining & Mfg. Co. v. Kelly*, supra, the fifth circuit stated as to the *Bradbury* case, that "Since the transfer was supported by adequate consideration and since there was nothing 'surreptitious or fictitious' about it, the court felt that the proscription of Section 1359 was inapplicable." The

presence of a surreptitious or fictitious transfer in the present case clearly distinguishes the present case from *Bradbury*. *Corabi v. Auto Racing, Inc.*, supra, is the primary case upon which Petitioner relies to establish the existence of a conflict. The *Corabi* case dealt with the appointment of an out of state administrator by a state court and a subsequent wrongful death action by that administrator in federal court. The Tenth Circuit defined the words "improper and collusive", in determining that this appointment was not within the prohibition of the statute, in a manner which was not acceptable to the Fifth Circuit, but as to *Corabi* the Fifth Circuit noted that:

> "The result is supported by the rule that the decree of a state probate court naming an administrator could not be collaterally attacked because of the purposes and motives of the parties when they practiced no fraud upon the court. *Mecom v. Fitzsimmons Drilling Co.*, 1931, 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233. Since the *Mecom* case precluded a collateral attack in federal court on Mr. Corabi's appointment as administrator, the court had no basis for labeling that appointment as improper or collusive within the meaning of Section 1359".

Like *Corabi*, *McCoy v. Blakely*, supra, and *County of Todd, Minn. v. Loegering*, supra, both involved the appointment of an out of state administrator or trustee and subsequent wrongful death action, and are clearly distinguishable from the present case for the above reasons. It is interesting to note that in the *McCoy* case the Court made reference to the fact that "The appointment and qualification of the plaintiff was real and bona fide. It was not merely colorable

or feigned," and also stated that "The record shows no collusion or impropriety in the appointment of Blakely." In *County of Todd, Minn.*, the Court stated "The evidence as a whole, on this point and as a matter of law, motive being deleted, permits no inference of sham, pretense or fiction or any other factors which enter into collusive or improper joinder to effect federal jurisdiction."

The only opinion discussed by the Fifth Circuit which is clearly contrary to and indistinguishable from the present case is the District Court case of *City of Eufaula, Alabama v. Pappas*, 213 F. Supp. 749 (M.D. Alabama, 1963), which the Fifth Circuit chose not to follow by stating with regard to this case that "In our opinion, the decision upholding jurisdiction under these circumstances represents an unjustified departure from pre-revision cases decided by the Supreme Court and serves to undermine the historic policy of limiting diversity jurisdiction."

III.

THE DECISION TURNS UPON FACTS IN THIS ACTION

Petitioner states that the decision below raises significant problems concerning efforts to invoke and create federal diversity jurisdiction, and argues that a Writ of Certiorari should issue so that this Court can provide the solution to certain "unanswered questions". The argument that the decision in this action creates significant problems is based upon his assumption that "the Fifth Circuit here could find no 'collusion' or 'impropriety' in the *Corabi* sense, for there

was no secret collusion between the petitioner and the respondent, nor was there any legal impropriety in the assignment to the petitioner of the Panama and Venezuela Company claims", his further assumption that "Moreover, such a legal assignment for the purpose of collection made the petitioner the real party in interest under Rule 17(a), F.R.C.P., for the purpose of prosecuting this Action. 3A Moore's Federal Practice, Sec. 17.09, p. 271 (1967)," and the contention that the opinion below creates a conflict between the Circuits with regard to the meaning of the words "collusive" and "improper", the relevancy of "motive", and "the historic policy of limiting diversity jurisdiction". It is respectfully submitted that these assumptions and contentions are not valid.

Although any question which relates to the jurisdiction of a federal court is of importance since the federal courts are courts of limited jurisdiction, the question presented in this action is not an important question for this Court in that the decision of the United States Court of Appeals is based upon facts which established that the Petitioner was named Plaintiff by virtue of a colorable or fictitious assignment. The question of whether or not there is a conflict has already been discussed, but it should be again noted that in *Corabi*, the Court was dealing with the actual and bona fide appointment by a state court of a representative for an estate, where there was no sham, pretense, or fraud practiced upon the court, and where to have held otherwise would have sanctioned a collateral attack upon that appointment; and that in *Black and White Taxicab & Transfer Co.*, as the Petitioner recognized, the

Court found that the transfer was actual, not feigned, and that the respondent was the real party in interest. With regard to the question of whether or not there was secret collusion in the present case, it should be noted that the "Assignment" from Panama and Venezuela Finance Company to Clayton S. Kramer appeared on its face to be a complete assignment to Kramer of Panama and Venezuela Finance Company's entire cause of action. Respondent did not learn of the existence of any other agreement between Mr. Kramer and Panama and Venezuela Finance Company until Kramer's deposition was taken and it was learned that there was an additional agreement. Clayton S. Kramer would not answer questions in the deposition with regard to the terms of this additional agreement, and it was necessary for Petitioner to file a motion with the trial court to compel the disclosure of the terms of this agreement, and to require him to produce the agreement. After the trial court granted this motion, it was then learned for the first time that Kramer was obligated under the terms of an "Agreement" to pay 95% of any amount which he collected, after payment of attorney's fees, to Panama and Venezuela Finance Company. It can hardly be said that this collateral agreement to pay 95% of the total amount collected was not secret when Respondent was forced to obtain an Order from the trial court directing Petitioner to answer questions in this regard, and when the "Assignment", upon which suit had been brought, appeared on its face to be a complete transfer of the entire cause of action and did not contain any reference to the "Agreement." The con-

clusion of the Petitioner that the "Assignment" made him the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure is not correct. 3A Moore's Federal Practice, ¶17.09, which was cited by Petitioner as support for this statement, begins with the following language:

> "At the outset it must be remembered that Rule 17(a) does not enlarge or restrict federal jurisdiction. Assignments cannot be used 'improperly or collusively' for the purpose of founding jurisdiction in a federal court. The principles hereinafter elaborated concerning an assignee as a real party in interest in federal court can be applied only in cases where there is proper jurisdiction."

Petitioner closes his Petition for a Writ of Certiorari with a reference to a Study of the Division of Jurisdiction between State and Federal Courts, conducted by the American Law Institute. This study by the American Law Institute and the district court opinion in *City of Eufaula*, which is the only case where there is a real conflict, are also discussed in 3A Moore's Federal Practice ¶17.05 [3.-3]. This section in Moore's considers from a jurisdictional standpoint both the appointment of a representative for an estate who has diverse jurisdiction and thus access to federal courts, and the transfer or assignment of a cause of action to create diversity jurisdiction. The reference by the ALI to the situation in the federal courts of Philadelphia appears to relate to the appointment of representatives who can invoke the jurisdiction of federal courts, not to the assignment of a cause of action to create diversity jurisdiction. These are related but distinct problems insofar as they concern the jurisdiction of a federal court in that

the appointment of a representative for an estate by a state court, and subsequent question of the jurisdiction of the court in an action by this representative on behalf of the estate in federal court requires the consideration of factors which are not present in determining the validity of a colorable or fictitious assignment of a cause of action to create diversity jurisdiction. In considering the assignment of a cause of action to create jurisdiction this aforementioned section of Moore's Federal Practice states that "In the decided cases involving transfers to create diversity, it does not appear that the results have been outrageous. However, there has also been criticism here, and the ALI refers to one 'particularly egregious example'." (referring to *City of Eufaula v. Pappas*, supra). This section of Moore's Federal Practice, which is an appraisal of Section 1359, then concludes that "We believe, however, that the federal courts should not await legislative action; that the judicial process is curative as well as creative; and that the federal courts should enunciate federal principles that would not permit either the deliberate manufacture or avoidance of federal jurisdiction." In that under the facts in this action, the opinion of the United States Court of Appeals for the Fifth Circuit does not conflict with the decisions of other Courts of Appeal and correctly sets forth principles previously established by this Court, there is no reason why the Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

Morris Harrell

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Counsel for Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel of record herein for Respondent Caribbean Mills, Inc., does certify that service of the above and foregoing Brief for Respondent in Opposition to Petition for a Writ of Certiorari, was this day accomplished pursuant to Rule 33(1) of the Rules of this Court by depositing 4 copies of same in a United States Post Office mail box, with air mail postage prepaid, by certified mail with return receipt requested, addressed to Jack Banner and Eugene Gressman, counsel of record herein for Petitioner Clayton S. Kramer, at their post office address of record herein.

July 1, 1965

Morris Harrell

Morris Harrell,
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 156

CLAYTON S. KRAMER,

Petitioner,

v.

CARIBBEAN MILLS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

The petitioner Clayton S. Kramer, for the reasons expressed in this brief, respectfully prays that the judgment of the United States Court of Appeals for the Fifth Circuit in this proceeding be reversed.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 392 F.2d 387 and is reprinted

in the Appendix, App. 82. No written opinion was rendered by the United States District Court for the Northern District of Texas; its judgment appears at App. 77.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 26, 1968. See App. 100. A timely petition for rehearing *en banc* was denied on March 5, 1968. The petition for a writ of certiorari was filed on June 3, 1968, less than 90 days after the denial of rehearing. This Court granted certiorari on October 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal diversity jurisdiction can be created by a lawful assignment of a money claim to a plaintiff.

2. Whether the assignment of a money claim is "improper" or "collusive" within the meaning of 28 U.S.C. § 1359 where (a) the assignment is legal under state law and (b) one motive for the assignment is to gain access to the federal court by creating diversity of citizenship as specified in 28 U.S.C. § 1332(a)(2).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

> *§ 1359. Parties collusively joined or made*
>
> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

STATEMENT OF THE CASE

The petitioner Clayton S. Kramer, as a citizen and resident of Texas, brought suit against the respondent Caribbean Mills, Inc., a Haitian corporation, in the United States District Court for the Northern District of Texas. Jurisdiction was grounded on 28 U.S.C. § 1332(a)(2), which grants original jurisdiction to federal district courts of all civil actions where the matter in controversy exceeds the sum of $10,000 and is between "citizens of a State, and foreign states or citizens or subjects thereof..".

Alleging a complete breach of an installment contract that had been assigned to him by the Panama and Venezuela Finance Company, a Panamanian corporation, Kramer sought to recover the total amounts due under the contract, $165,000, plus costs and interest. Following a jury trial, the District Court entered judgment in favor of Kramer for the amounts sought. But the Court of Appeals for the Fifth Circuit reversed. It held that, by virtue of 28 U.S.C. § 1359, the District Court had been ousted of jurisdiction inasmuch as the assignment of the contract to Kramer was "collusive" and "improper" and "was made for the purpose of creating federal jurisdiction without divesting the assignor [Panama and Venezuela Finance Company] of his interest in the law suit." App. 85.[1] Concededly, the District Court would have had no jurisdiction over a suit between the two alien corporations that were signatories to the contract.

---

[1] In this brief, "App." references relate to the Appendix printed for use of this Court; "R." references are to the Printed Record before the Court of Appeals for the Fifth Circuit, which has been certified to this Court; references are also made to certain exhibits (e.g., Pl. Ex. 1), the originals of which have been certified and filed with the Clerk of this Court.

The Original Contract

Among the original founders and stockholders of Caribbean Mills, Inc., the respondent herein, was one Roy B. Kelly of Washington, D.C.[2] In 1957, Kelly and certain other stockholders entered into an understanding which granted to Kelly a so-called "continuing economic interest" in the nature of a net profits interest tied to earnings of this corporation, such interest to commence only after the construction indebtedness of a certain new flour mill had been retired. Pl. Ex. 1. Kelly also served as president of Caribbean Mills for several years. R. 155.

As of 1959, Kelly owned an 80% interest in this "continuing economic interest." In addition, he held a certificate representing 125 shares of stock of Caribbean Mills. Panama and Venezuela Finance Company also asserted an interest in this certificate, having earlier received the 125 shares of stock as a pledge for a loan of money to Kelly and having foreclosed on those shares when Kelly defaulted on repayment of the loan. R. 318-319, 292-293, 320-321.

In the meantime, virtually all of the capital stock of Caribbean Mills had been acquired by Clint Murchison and others of his family with the exception of the 125 shares held by Panama as the result of the Kelly pledge. Murchison and Kelly fell into disagreement and Murchison wanted Kelly out of the Caribbean Mills operation. Several attempts were made to purchase Kelly's interest, culminating in an agreement dated May 30, 1959, and made effective on June 4, 1959. On the day preceding the execution of that agreement, Kelly by letter and in consideration of Panama's "execution of the proposed agreement tomorrow," assigned to Panama "all of my right, title and interest to the $165,000" that was to be paid in installments under the proposed tri-

---

[2] Caribbean Mills, Inc., was incorporated under the laws of Haiti, using the name and style of Societe Haitienne de Minoteria, S.A. Its name was later changed to Caribbean Mills, Inc. It is a manufacturer of flour and by-products. App. 70. It operates a flour mill in Port-au-Prince in Haiti. R. 99.

partite agreement. R. 30. Without such an assignment, Panama would not have entered into the agreement.

This tripartite agreement, entered into by Caribbean Mills, Kelly and Panama, constitutes Pl. Ex. 1 and provides in pertinent part as follows:

(1) Kelly and Panama, representing that they had full power to do so, assigned and transferred to Caribbean Mills the certificate evidencing the 125 shares of stock.

(2) Kelly, representing that he was the sole owner of the 80% interest in the so-called "continuing economic interest," transferred and assigned that 80% interest to Caribbean Mills.

(3) Kelly and Panama agreed to deliver to Caribbean Mills the 125 shares of stock at the closing of the transaction.

(4) Caribbean Mills agreed that it would pay to Kelly and/or Panama "at such place as they, jointly, shall designate" the sum of $250,000. Of that amount, $85,000 was to be paid on the closing date of the agreement and the remaining $165,000 was to be payable in twelve annual installments of $13,750 each, "the first such installment to be due and payable on June 1, 1962, and a like installment to be due and payable on June 1 of each year thereafter until the full sum of One Hundred Sixty-Five Thousand Dollars ($165,000.00) shall have been fully paid."

(5) It was further agreed that Kelly and Panama were acting jointly with respect to this contract and that the settlement of affairs between them was not a matter with which Caribbean Mills was concerned. Caribbean Mills was acknowledged to have the right to disburse the $85,000 by its check payable to Kelly and Panama, jointly.

(6) With reference to a prior loan to Kelly by one Sid Richardson for the purchase of stock in Kirby Petroleum Co., it was agreed that Caribbean Mills would cause Kelly's promissory notes to Richardson to be refinanced so as to

be due and payable at a later date. It was also agreed that Kelly would execute a renewal promissory note, payable to Richardson and reflecting the outstanding balance and accrued interest; as security for that renewal note, Kelly agreed to pledge, transfer and assign to Richardson all of Kelly's right, title and interest in the instant agreement. Panama, of course, was not a party to this portion of the agreement.

(7) The agreement was declared to be in full and final settlement of all claims of any kind by or between Caribbean Mills, on the one hand, and Kelly and/or Panama, on the other hand. The agreement was further declared to be binding upon Caribbean Mills and "its predecessors, successors and assigns," as well as upon "Roy B. Kelly, his heirs, successors, adminstrators or personal representatives or assigns, and Panama and Venezuela Finance Company, its successors or assigns."

The contract was duly signed by these three parties, Walter M. Spradley signing as vice-president of Caribbean Mills, Roy B. Kelly signing for himself, and Eduardo Alfaro signing as president of Panama and Venezuela Finance Company. On June 4, 1959, the closing date of the contract, Caribbean Mills duly paid the first installment of $85,000 in a draft payable to Kelly.

Subsequently, in 1961, and before any of the remaining $165,000 installment payments became due, the Murchison family acquired from Richardson the Kirby Petroleum Co. stock in question, as well as Kelly's agreement to pledge and transfer to Richardson all of his right, title and interest under the tripartite agreement of May 30, 1959. Allegedly, Caribbean Mills thereby acquired its agreement to pay the $165,000 for the sum of $55,626.20. R. 256-259, 273. No notice was given to Panama and Venezuela Finance Co. of any of these events. R. 255.

The Assignment of the Contract

In accordance with the terms of the foregoing contract, the first installment payment of $13,750 accrued and became due on June 1, 1962. In July of 1962 Panama and Venezuela Finance Company requested payment of that amount. Such payment was refused by Caribbean Mills despite repeated demands. App. 4. Subsequent annual installment payments have likewise not been made. The reasons for such defaults are disputed but are not here relevant.

Thereafter, on September 21, 1964, Panama and Venezuela Finance Company executed an assignment of all its right, title and interest in the aforesaid contract, "including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, [and] monies due and/or to become due" under that contract. App. 13-14. The assignee was one Clayton S. Kramer, identified in the assignment as "of Wichita Falls, Wichita County, Texas." App. 13. The consideration for the assignment was stated to be "One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged." App. 13. The assignment stated that it was "made under the laws of the State of Texas" and in the event of any question as to the validity of the assignment "it shall be construed and governed by the laws of the State of Texas, and the powers, duties and benefits flowing hereunder to the said Clayton S. Kramer shall be controlled by the laws of the State of Texas." App. 14. The full text of the assignment was as follows (App. 13-14):

> Assignment of Sept. 21, 1964
>
> Know All Men By These Presents:
>
> That we, the undersigned Panama and Venezuela Finance Company, a Panamanian Corporation, for and in consideration of One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, does hereby assign, sell and convey to Clayton S. Kramer of Wichita Falls, Wichita County, Texas, all of our right, title and interest,

including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, monies due and/or to become due, arising from or out of a certain agreement and contract in writing, dated June 4, 1959, between Caribbean Mills, Inc., a Haitian Corporation, Roy B. Kelly of Washington, D.C. and Panama and Venezuela Finance Company, under which contract or agreement Caribbean Mills agreed to pay to Panama and Venezuela Finance Company and/or Roy B. Kelly the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) on such terms and at such times as were more fully set out in said instrument, a copy of which is attached hereto as Exhibit A, and fully incorporated herein by reference. This assignment specifically includes another certain agreement, made in connection with the original agreement heretofore described, such other agreement being a collateral agreement and contract of Murchison Brothers and others, dated on or about June 4, 1959, a copy of such agreement is also attached hereto as Exhibit B, and fully incorporated herein by reference.

Panama and Venezuela Finance Company warrants to Assignee herein that it is the owner of and entitled to all benefits arising by virtue of the agreements and/or contracts herein assigned and has the right to make this assignment of the same.

It is agreed that this assignment to the said Clayton S. Kramer is made under the laws of the State of Texas, and in the event that there is any question of validity of such assignment, it shall be construed and governed by the laws of the State of Texas, and the powers, duties and benefits flowing hereunder to the said Clayton S. Kramer shall be controlled by the laws of the State of Texas.

That I, the undersigned officer of Panama and Venezuela Finance Company am specifically authorized and empowered to make such assignments to Clayton S. Kramer and such contract for Panama and Venezuela Finance Company herein.

Made and executed on this the 21st day of Sept., A.D. 1964.

PANAMA AND VENEZUELA
FINANCE COMPANY,
By E. Alfaro.

Simultaneously with the execution of this assignment, Kramer and Panama entered into a collateral agreement whereby Kramer agreed to "pay solely as a Bonus to Panama and Venezuela Finance Company, or anyone properly designated by it in writing, a sum equal to 95 per cent of the net proceeds or monies obtained from Caribbean Mills, Inc., or others," by virtue of the assigned contract. App. 15. This 95 per cent "bonus" was to be calculated on a net basis, following the payment of attorney fees and expenses of litigation, and the remaining 5 per cent was for Kramer's "own use and benefit." App. 16. The attorney fees were not to exceed one-third of any gross recovery obtained from Caribbean Mills or others. App. 16. This collateral agreement read in full as follows (App. 15-16):

Agreement of Sept. 21, 1964

STATE OF TEXAS
COUNTY OF WICHITA:

KNOW ALL MEN BY THESE PRESENTS: That we, Panama and Venezuela Finance Company, a Panamanian corporation, and Clayton S. Kramer, do hereby agree and contract as follows:

WHEREAS, previously the Panama and Venezuela Finance Company, for valuable consideration, by instrument in writing, irrevocably assigned, sold and conveyed to Clayton S. Kramer all of its right, title and interest under and arising out of a certain contract or agreement closed June 4, 1959, between Panama and Venezuela Finance Company, Caribbean Mills, Inc., and Roy B. Kelly, together with an assignment of a connected agreement dated on or about June 4, 1959, from Murchison Brothers and others; and,

WHEREAS, the said Clayton S. Kramer is now the sole owner of any action or causes of action derivative therefrom, with the independent right of management, control and prosecution thereof, and does hereby indemnify and hold harmless the Panama and Venezuela Finance Company from any cost or expense that has or may arise out of the prosecution of any demand or suit on said contracts; and,

WHEREAS, the said Clayton S. Kramer agreed to make demand on said contracts and collect or prosecute to final Judgment all claims thereon; it is hereby collaterally Agreed, that in the event of payment to or recovery on said contracts by Clayton S. Kramer, he will pay solely as a Bonus to Panama and Venezuela Finance Company, or anyone properly designated by it in writing, a sum equal to 95 per cent of the net proceeds or monies obtained from Caribbean Mills, Inc., or others, under or by virtue of the contracts heretofore assigned to the said Clayton S. Kramer, it being understood by the parties hereto, that the said Clayton S. Kramer shall have the right to employ attorneys on a contingent fee basis, paying to such attorneys an amount not to exceed thirty-three and one-third per cent (33 1/3%) of the gross recovery obtained from Caribbean Mills or others, and to pay expenses of litigation not to exceed one-half (1/2) the total of such expenses. In other words, after the payment of attorney fees and expenses, Clayton S. Kramer is to pay to Panama and Venezuela Finance Company or its order, ninety-five (95 per cent of the remainder of the net recovery, if any, and retain five (5) per cent for his own use and benefit.

This contract and agreement by and between the parties hereto is made and is to be performed in the State of Texas; that the same was drawn by the parties with reference to the laws of the State of Texas, and it is hereby specifically contracted and agreed that in the event of any controversy, dispute or litigation relating to or arising out of this instrument, the laws of the State of Texas specifically control.

In consideration of our mutual promise and consideration with which this instrument passes, we set our hands hereunto on this the 21st day of Sept, A.D. 1964.

/s/ Clayton S. Kramer
Clayton S. Kramer

PANAMA & VENEZUELA
FINANCE COMPANY

By E. Alfaro

Kramer is an attorney, whose principal business is the practice of law in Wichita Falls, Texas. App. 30. He testified at the trial that the early summer of 1964 was the first time he had learned of the May 30, 1959 contract that was thusly assigned to him. App. 32. He heard of this contract and the claim thereunder from another Wichita Falls attorney, Jack Banner, who has represented Kramer at all stages of this litigation. Banner at that juncture was briefing a legal point concerning the prosecution or enforcement of the unpaid obligation under the contract. App. 36. Kramer advised Banner that he was interested in acquiring the claim, knowing that none of the installment payments had been made. App. 36-37. Kramer recognized the possibility that legal action might be necessary to collect on the claim. App. 54. But at the time of the acquisition of the contract there was no conversation between Kramer and Banner as to the necessity of filing suit in order to enforce the contract. App. 60-61. Kramer, moreover, did not know whether Banner had had any discussions with Panama with respect to the institution of any such suit in a federal court. App. 59.

Kramer himself had no direct contact with Panama and had no participation in or personal knowledge of the events leading to the execution of the contract of May 30, 1959. App. 61, 67. At no time did he personally communicate with any persons connected with Panama, either before or after the institution of this action. App. 64-65. And at no time did Panama exercise any control, management, or super-

vision of the means or manner in which Kramer handled or prosecuted the claim under the contract. App. 60.

With respect to the collateral agreement to pay the 95 per cent "bonus" to Panama,[3] Kramer testified (App. 45) that

> "I told Mr. Banner that I did not want to put up any cash to purchase the claim, that I did not—that I would prefer not to borrow a large sum of money for it. On the other hand, I wanted a claim that was clear with no strings attached, that I wouldn't have to answer to anyone else for, and I don't know who brought it up, but ultimately I told Mr. Banner, 'I don't want the assignment messed up,' but I would give him a bonus."

He further testified (App. 57) that

> "I did obligate myself to Panama-Venezuela Finance Company to use my best efforts to handle and prosecute the claim. However, if I didn't want to put a lot of money into it, I didn't want to go into hock the rest of my life for it—at the same time I didn't expect them to just completely sit there and say, 'Take it all for the $1 plus your promises to prosecute the claim, plus your indemnity agreement,'—I finally told Jack [Banner], or Jack and I talked it over and decided that was one way to do it—was by paying a bonus, and I thought that that

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[3]The amended complaint in this case made no reference to this collateral agreement, referring rather only to the assignment. App. 4. The amended answer and the motion to dismiss, while asserting that Kramer was not a real party in interest and that he had been collusively made a plaintiff "by virtue of a purported assignment" in order to invoke diversity jurisdiction, also made no reference to the collateral agreement. App. 6, 10. Prior to filing that answer and motion, the respondent Caribbean Mills sought, by deposition, to inquire of Kramer as to the details of this collateral agreement. At first Kramer refused to answer such questions on advice of counsel. But by obtaining a court order to compel such answers (see App. 20), the respondent obtained full answers in the resumed deposition. Kramer testified fully at the trial concerning this agreement. App. 42-69.

was fair, but the bonus—this collateral agreement was to have nothing to do with the assignment."

Kramer's consideration of the terms of this collateral agreement was derived solely from conversations with Banner, which included some discussion of whether the "bonus" figure should be 90 or 95 per cent. App. 46. At this point Banner began to act as Kramer's counsel and in that capacity negotiated the terms of both the assignment and the collateral agreement with Panama. App. 46-47.

Kramer further testified that he had paid to Panama the $1.00 that was recited as the consideration for the assignment and that he had paid certain expenses in connection with the litigation. App. 47. He also entered into a formal retainer agreement with the law firm of which Banner was a member, agreeing to pay that firm one-third of the total recovery obtained from Caribbean Mills "whether by judgment, settlement or otherwise." App. 18-19. Under that agreement, Kramer agreed to reimburse the firm for any expenses other than ordinary office expenses, the firm retaining the right to determine whether an appeal should be taken from any unfavorable judgment. App. 19.

Following the execution of the assignment and the collateral agreement, a demand was made of Caribbean Mills on behalf of Kramer for the payment of the monies due under the contract. This demand was ignored. Neither at this point nor at any time prior thereto was anything said to Kramer respecting the filing of a suit in a federal court. App. 58-59. But after the demand had been rejected "there was some talk about the suit, or, I believe we discussed where it would be filed, which Court, but that was shortly before suit was filed." App. 59.

The Court Proceedings

The complaint in this proceeding was originally filed in November of 1964 in the United States District Court for the Northern District of Texas, Wichita Falls Division. App. 1. In amended form, the complaint was refiled with per-

mission of the court in the Dallas Division of the Northern District of Texas on February 5, 1965. App. 2. The amended complaint alleged that (1) Kramer was a citizen and resident of Texas, while Caribbean Mills was a foreign corporation organized under the laws of Haiti and having a place of business in Dallas, Texas, (2) this was a suit for debt arising out of the contract dated May 30, 1959, which was summarized, (3) all rights of Kelly in that contract had been transferred to Panama, which in turn had assigned and delivered its entire interest in the contract to Kramer, (4) Kramer had designated a place of payment and had demanded payment of the installments, and (5) Caribbean Mills had refused to pay any of the installments and denied all liability therefor, thus constituting a complete breach of the agreement and causing all obligations thereunder to become immediately due and payable. Judgment was accordingly sought in the sum of $165,000, together with costs and 10 per cent interest from and after June 1, 1962. App. 5.

This complaint was duly served upon Caribbean Mills through its vice president, Walter M. Spradley, at his office in Dallas, Texas. Prior to trial, the District Court overruled a motion to dismiss the action for lack of jurisdiction over the person of the defendant corporation and to quash the return of service. That action by the court reflected the evidence adduced that demonstrated that Caribbean Mills had more than minimum contacts with the jurisdiction in question and was actually doing business in the Northern District of Texas. Among such contacts with the Northern District of Texas were the residence of several of the corporate officers, the maintenance of corporate bank accounts, the borrowing of money from banks, the execution and signing of contracts, and the conduct of certain other corporate business. App. 70-76.

The amended answer filed by Caribbean Mills denied that it had any obligation to make further payments under the May 30, 1959, agreement and alleged that it had acquired from Roy B. Kelly all the right to sums due and payable thereunder. App. 6-9. The answer further asserted that the

District Court lacked jurisdiction "in that Clayton S. Kramer is not the real party in interest, and by virtue of a purported assignment, Clayton S. Kramer has been improperly or collusively made Plaintiff in this cause to invoke the diversity jurisdiction of this Court, which would not otherwise be present." App. 6. This latter assertion, making specific reference to 28 U.S.C. § 1359, was repeated in a motion to dismiss, filed simultaneously with the answer. App. 10.

Following a hearing on the motion to dismiss, the District Court overruled the motion, "being of the opinion that the Defendant's Motion to Dismiss the Action for the reason that Clayton S. Kramer was improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court, should be overruled, in that the assignment from Panama and Venezuela Finance Company to Clayton S. Kramer was good on its face." App. 12.

A jury trial on the merits of the cause of action thereafter ensued. Various special issues were submitted to the jury, and among its answers to the special interrogatories were the following:

(1) Roy B. Kelly did assign to Panama all of his interest in the agreement of May 30, 1959, except for any interest he had in the $85,000 cash payment. App. 77.

(2) Panama did assign all its interest in that agreement to Clayton S. Kramer. App. 78.

(3) Panama's interest in the agreement at the time of the assignment to Kramer amounted to $165,000. App. 78.

(4) The parties to the agreement did not intend, at the time of executing the agreement, that the $165,000 in payments would be subject to and pledged as security for Kelly's indebtedness to Sid Richardson. App. 78.

(5) Panama executed the agreement believing it to be the full and only agreement between Kelly, Caribbean Mills and Panama. App. 79.

(6) Caribbean Mills did intentionally omit matters from the agreement and failed to inform Panama of that omission. App. 80.

The District Court, in light of these jury answers and the testimony and evidence at the trial, found that the plaintiff Kramer was entitled to receive judgment against Caribbean Mills for $165,000. App. 81. Judgment for that amount was entered, together with court costs and 6% interest from the date of judgment until full payment of the $165,000. App. 81.

That judgment was reversed by the Court of Appeals on its determination that the assignment was collusive and hence deprived the District Court of jurisdiction under 28 U.S.C. § 1359.

SUMMARY OF ARGUMENT

The basic question is whether a party has been "improperly or collusively made or joined to invoke the jurisdiction of such court," thereby ousting the federal court of jurisdiction under 28 U.S.C. § 1359, where the party's status is the result of a lawful assignment of a contract and a cause of action thereunder. It is here conceded that, while the petitioner himself had his own reasons for acquiring the contract and cause of action, such assignment was in substantial part motivated by a desire by counsel to make diversity jurisdiction available should it subsequently be determined that the suit be brought in a federal rather than a state court.

1. Significantly, this case does not involve an attempt to invoke ordinary diversity jurisdiction over matters in controversy between "citizens of different States." 28 U.S.C. § 1332(a)(1). Rather it involves the alienage provision of § 1332(a)(2), conferring jurisdiction where the matter in controversy is between "citizens of a State and foreign states or citizens or subjects thereof." The original parties to the assigned contract in this case both being aliens, the federal court would have had no jurisdiction to entertain a

suit between them. And the assignment of the contract by one of those aliens to a citizen of Texas was designed, in compliance with state law, to invoke the alienage diversity jurisdiction of the federal court under § 1332(a)(2).

The fact that the alienage diversity provision underlies the effort to invoke federal jurisdiction has several important consequences: (a) the original controversy between the two aliens is not so intimately a matter for state court adjudication as is a matter between citizens of the same state; (b) an effort to create alienage diversity does not carry with it any marks of a device to wrest from state courts a jurisdiction that necessarily belongs there; (c) the presumed prejudice of state courts against litigants from distant parts of the country obviously reaches its peak as to alien, out-of-the-country litigants; (d) the need and justification for the assertion of federal court jurisdiction spring from this element of prejudice and hence are at their height in the alienage context; and (e) since there are relatively few controversies arising in this country between aliens, there is no danger of overloading federal court dockets with suits of this nature if legitimate and bona fide efforts to invoke alienage diversity jurisdiction are permitted.

2. The mere fact that there was a motive in this instance to create and invoke alienage diversity jurisdiction does not operate *per se* to oust a federal court of jurisdiction. Indeed, the repeated decisions of this Court have established that such a motive to create jurisdiction is entirely irrelevant if the factors utilized to create that jurisdiction are in themselves lawful and proper.

This Court has recognized the propriety of creating or manufacturing federal jurisdiction in a variety of situations, including the invocation of this Court's original jurisdiction (*South Dakota v. North Carolina*, 192 U.S. 286), the invocation of diversity jurisdiction through change of domicile (*Williamson v. Osenton*, 232 U.S. 619), the invocation of diversity jurisdiction through corporate realignments and transfers of assets (*Black and White Taxi Co. v. Brown and*

Yellow Taxi Co., 276 U.S. 518), and the invocation of diversity jurisdiction through such other devices as transfers of land or contracts or the selective naming and omission of parties to a class action or a stockholders' derivative suit. Efforts to defeat diversity jurisdiction through the appointment of an administrator or guardian of the same state citizenship as that of the other party to a suit have also been recognized (*Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183). In all of these instances, the devices used were lawful and bona fide, thus making irrelevant the fact that the motive underlying the devices was directed toward creating federal jurisdiction.

In short, if the transaction, transfer or assignment be in itself valid and lawful "it makes no difference that by such transaction the transferee acquired the advantage of suing in the federal court." *Cross v. Allen*, 141 U.S. 528, 533.

3. The existence of a valid assignment in this case has been established by the controlling law of Texas, the findings of the jury and the determination of the trial judge.

Under Texas law, which was made controlling by the terms of the assignment, an assignment is deemed complete and valid where (a) the parties intend to transfer the rights of the assignor, and (b) there is a delivery of the assignment instrument, either actual or symbolic. Such an intent and delivery are sufficient to transfer title and to evidence a bona fide assignment even though the assignee may have paid no consideration. Texas thus follows the general rule that the assignment of an entire chose in action is valid and irrevocable after delivery though made without consideration. *Hughes v. Dopson*, 135 S.W.2d 148, 149-150 (Tex. Civ. App.). Moreover, in a suit between the assignee and the original obligor under the assigned contract, the question of consideration for the assignment or the adequacy of such consideration is entirely irrelevant and cannot be the subject of inquiry. *Durst v. Swift*, 11 Tex. 273; *Glass v. Carpenter*, 330 S.W.2d 530, 537 (Tex. Civ. App.).

In this case, the intent to transfer Panama's entire interest in the original tripartite agreement to the petitioner Kramer was perfectly clear, and delivery of the assignment instrument was made. While consideration for the assignment was not necessary under Texas law and cannot be inquired into by an obligor like the respondent Caribbean Mills, there was more than adequate consideration for the assignment in this case: (a) the payment of "One Dollar and other good and valuable consideration"; (b) the assumption by Kramer of the management, control and burden of any lawsuit; (c) the promise by Kramer to indemnify Panama for any obligations arising out of enforcement of the contract; and (d) the deferred "bonus" payment to Panama of 95 per cent of the net proceeds of any recovery by Kramer. As a result, all of Panama's rights in the original tripartite agreement were irrevocably assigned to Kramer and Panama had no control whatever over any lawsuit Kramer might decide to institute.

Moreover, upon a consideration of all the documents and facts, including those involving the collateral agreement and the 95 per cent "bonus," the jury on proper instructions and in response to special interrogatories found that Panama did in fact assign all of its $165,000 interest in the tripartite agreement to Kramer. And the trial judge, after a full consideration of these documents and facts, ruled that the assignment "was good on its face" and that Kramer had not thereby been "improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court." App. 12.

4. Section 1359 of Title 28, United States Code, is a creature of the 1948 revision of the Judicial Code. As part of that revision:

(a) The famous assignee clause, dating back to the Judiciary Act of 1789, was eliminated.

(b) Also eliminated was the first portion of Sec. 5 of the Act of March 3, 1875, which directed the dismissal of a suit whenever it appears "that such suit does not really and sub-

stantially involve a suit or controversy properly within the jurisdiction" of the federal court. This was omitted by the revisers as "unnecessary." But this omission may have removed an important factor in defining the "improperly or collusively" language of § 1359 by eliminating from the concept of collusion the designation of a nominal party who has no real or substantial interest in the controversy, for the purpose of creating diversity. See *McSparran v. Weist*, decided by the Third Circuit on Oct. 2, 1968, No. 772, Oct. Term, 1968.

(c) The second portion of Sec. 5 of the 1875 Act was retained and became what is now designated as § 1359. It provides for dismissal whenever it appears that a party, "by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

This legislative reshuffling, however, did not change the long-standing doctrine that, standing alone and apart from any collusive implementation, a motive to create diversity jurisdiction does not affect or destroy that jurisdiction. If the device utilized to create diversity is lawful and not collusive, § 1359 does not come into operation whatever the motive.

Turning to what lower courts have described as the ambiguous and indefinite words "improperly or collusively," as they appear in § 1359, it is apparent from their plain meaning that some sort of illegal or fraudulent action or impropriety is required to bring the statute into operation. See *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190. No such illegal or fraudulent action here occurred, the assignment being entirely lawful and not designed to injure the opposing party in any way. And the major purpose of § 1359, to protect the federal courts from frauds perpetrated on their jurisdiction, likewise implies that there be something more than a lawful transaction by which the transferee acquires the advantage of suing in the federal court. There must be something illegal or fraudulent about the transaction, labels which cannot be applied to a transaction that is legitimate under state law.

To the extent that collusion or impropriety may be said to relate to the absence of consideration for an assignment, or the lack of an irrevocable transfer of interest, or the retention by the assignor of control over federal litigation, none of those elements is here present. Equally significant is the fact that the jury and the trial judge both made affirmative determinations that those elements did not here exist and that the assignment was complete and irrevocable. The Fifth Circuit plainly erred in failing to give any weight or respect to those findings. See *Barry v. Edmunds*, 116 U.S. 550.

Finally, if this Court should disagree with the contentions of the petitioner, it is requested that the Court's ruling be made prospective only so that the petitioner will not suffer hardship. To remand him now to whatever remedies he may have in the Texas courts would subject him to the loss of installment payments that have accrued and could not now be recovered in a suit instituted after the limitations period has expired.

ARGUMENT

The central issue in this case is whether the making of a lawful assignment of a contract and a cause of action thereunder, an assignment motivated in substantial part by a desire to create the basis of alienage diversity jurisdiction, collides with the provision of 28 U.S.C. § 1359 that a federal district court "shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

The petitioner concedes that the assignment was in part arranged by counsel in order to make diversity available should it subsequently be determined that the suit be brought in a federal rather than a state court. But the petitioner does not concede that this federal jurisdictional problem was the sole motive for the assignment. At the time

the assignment was made, a decision had not been reached as to the court in which suit would be instituted. And the record in this case affirmatively establishes that prior to and quite apart from any determination to bring this suit in the federal court the petitioner Kramer had become interested for his own reasons in acquiring the contract claim. App. 36-37, 60-61. But of far more significance than motive is the fact that he acquired the claim in a manner that validated the assignment under state law. Motive thereby became irrelevant.

The existence of that lawful assignment was further attested to by the jury finding, derived from a preponderance of all the evidence concerning the circumstances relative to the assignment, that "Panama and Venezuela Finance Company assigned all its interest, if any, under the May 30, 1959 Agreement to Clayton S. Kramer." App. 78. And the District Court, likewise reviewing those circumstances at a full hearing on the matter, concluded that the assignment "was good on its face" and that Kramer had not been "improperly and collusively made the Plaintiff in this suit for the purpose of invoking the diversity jurisdiction of this Court." App. 12.

It is against this background of state law and of determinations by judge and jury that the central issue in this case must be assessed. In a word, that background establishes that a legitimate decision was made to bring this action in a federal court, a decision made possible by a lawful and effective assignment of a cause of action. Such a decision bears none of the earmarks of an attempt to invoke diversith jurisdiction by "improperly or collusively" joining or making as the party plaintiff the assignee of that cause of action.

1. Attempts to create alienage diversity must be viewed differently from attempts to create out-of-state diversity.

Significantly, this is not an ordinary diversity case nor one in which an attempt was made to create ordinary diversity jurisdiction—i.e., the jurisdiction conferred by 28 U.S.C. § 1332(a)(1) over matters in controversy exceeding $10,000 between "citizens of different States." Rather it involves the alienage provision of § 1332(a)(2), conferring jurisdiction where the matter in controversy is between "citizens of a State, and foreign states or citizens or subjects thereof."

So identifying the type of diversity jurisdiction here sought to be created is an important predicate to the questions raised in this case. Much of what has been said, judicially and otherwise, about the evils of manufacturing diversity jurisdiction impliedly or overtly assumes that federal courts should be protected from attempts to invoke jurisdiction over matters that truly are controversies between citizens of the same state and that should be determined by the courts of that state. In *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 342, for example, a collusive scheme to create diversity jurisdiction was condemned as a "plan . . . to wrest the judicial determination of the present controversy from the courts of the state in which the land lies." And in *Miller & Lux v. East Side Canal & I. Co.*, 211 U.S. 293, 303, the device condemned was one "by which to have the rights asserted by the California corporation in a state court determined by the Federal court rather than by the state court."

But a suit between two alien parties, unlike a suit between two citizens of the same state, is not one that necessarily or even preferably belongs in a state court, even assuming the jurisdictional requisites of a state court suit can be satisfied. Indeed, "it has never made any difference where the suit is brought, and probably should not, since there may be a real danger of prejudice, in any forum, against the alien." Wright, *Federal Courts* 70 (1963). Hence any effort

to create an alienage type of diversity does not carry with it any marks of a device to wrest from state courts a jurisdiction that properly belongs there.

True enough, the federal courts have never been given jurisdiction over a suit between two aliens. *Montalet v. Murray*, 4 Cranch 46; *Hodgson v. Bowerbank*, 5 Cranch 303; *Jackson v. Twentyman*, 2 Pet. 136; but cf. *Pang-Tsu Mow v. Republic of China*, 201 F.2d 195, 198-199 (App. D.C.). Nor have they been given jurisdiction over suits between citizens of the same state involving local causes of action. But it is principally the latter type of lawsuit that Congress and the federal courts have steadfastly sought to exclude from the federal jurisdictional ken. The primary thrust of what is generally called federal diversity jurisdiction is to permit local law controversies in the federal courts only where the real parties are truly citizens of different states. As Mr. Justice Frankfurter stated in his dissenting opinion in *Burford v. Sun Oil Co.*, 319 U.S. 315, 336-337:

> "The reasons which led Congress to grant such jurisdiction to the federal courts are familiar. It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim. To avoid possible discriminations of this sort, so the theory goes, a citizen of a state other than that in which he is suing or being sued ought to be able to go into a wholly impartial tribunal, namely, the federal court sitting in that state. Thus, the basic premise of federal jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts."

Thus it is that the "stuff of diversity jurisdiction is state litigation" and that the "availability of federal tribunals for controversies concerning matters which in themselves are outside federal power and exclusively within state authority,

is the essence of a jurisdiction solely resting on the fact that a plaintiff and a defendant are citizens of different States." *Lumbermen's Casualty Co. v. Elbert*, 348 U.S. 48, 54 (concurring opinion of Mr. Justice Frankfurter). Somewhat different considerations must have motivated the constitutional and legislative creation of federal jurisdiction over suits between an alien and a citizen of a state, as now embodied in § 1332(a)(2). Presumably, the possibility of state court discrimination against an alien was considered even greater and more likely than the possibility of discrimination against a citizen of another state.[4] And while federal courts are not permitted to adjudicate disputes between two aliens, the possibility of state court prejudice against one or both aliens would obviously be at the zenith in such a situation.

In terms of possible discrimination, therefore, to inveigh against devices to create diversity of citizenship in a suit that is really one between citizens of the same state is to remand the parties to their remedies in a state court where the potential of out-of-state discrimination cannot exist as between the true parties. But outlawing an attempt to create alienage diversity where both of the original parties are aliens remands those parties to a forum where the potential of discrimination—the hallmark of the need for federal diversity jurisdiction—remains unchanged and indeed may well be intensified. For that very reason, a lawful attempt to create alienage diversity must be viewed differently and assessed more carefully than an attempt to create an out-of-state diversity.

It has been said, of course, that this element of prejudice or reasonable fear of prejudice has been overdrawn and that

[4] "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on the subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." *Bank of the United States v. Deveaux*, 5 Cranch 61, 87 (per Marshall, C.J.).

"the social and economic incentives to interstate movement and business today are so great as to override any risk of injustice in state courts."[5] And it has been suggested that none of the significant prejudices which beset our society today begin or end when a state line is traversed. Yet even those who hold such views still concede that "the bias which was formerly thought to operate against out-of-staters as such seems still to exist to some degree with respect to persons from a more distant part of the country" and that "diversity jurisdiction thus may give protection from real or imagined prejudice against persons who are indeed out-of-staters."[6]

Such prejudice or bias as still exists with respect to out-of-state persons from "a more distant part of the country" must be deemed even more pronounced as to parties of an alien or out-of-the-country status. It is that presumed prejudice, or the appearance of such prejudice, that underlies lawful attempts to bring about the requisite elements for invoking federal jurisdiction under § 1332(a)(2). And since that prejudice cannot be avoided by remanding the alien parties to state courts, as it can be avoided by remanding truly in-state parties to their own state courts, the efforts to invoke federal alienage jurisdiction by assignment or otherwise should be viewed differently if not more tolerantly. Moreover, to the extent that the statutory and judi-

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[5] American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, Proposed Final Draft No. 1, p. 52 (April 19, 1965).

[6] *Ibid.*, p. 53. The American Law Institute study also suggests (p. 54) that this risk of prejudice should be considered not as a separate problem but rather as one aspect of the possible shortcomings of state justice. "One such shortcoming is that the state venue provisions often localize the place of trial in small constituencies. In these circumstances justice is likely to be impeded by the provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the local 'court house gang.' These phenomena are not isolated matters, but ones which are constantly experienced by trial lawyers all over the country."

cial proscriptions against so-called manufactured diversity jurisdiction are dictated by a fear that the dockets of the federal courts would otherwise "be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance," *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 343, that fear can have little if any realization with respect to suits involving one or more aliens. Such suits constitute but a minute fraction compared to those between citizens of the same state whose controversies might well inundate the federal courts were the existing proscriptions lifted.

Thus the repeated admonitions against efforts to create federal diversity jurisdiction stem from the fact that most of that jurisdiction trenches upon the jurisdiction of the state courts. As Mr. Justice Frankfurter said for the Court in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 76-77, "The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business. . . . 'The policy of the statute [conferring federal diversity jurisdiction] calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"

But suits between aliens do not partake of those matters that intrinsically belong to the state courts, and the assertion of federal jurisdiction cannot trench upon the jurisdiction of the state courts as in the case of suits between citizens of different states. For practical and conceptual pur-

poses, different considerations are at stake in efforts to create alienage diversity by lawful means.

None of the precedents in this Court have dealt with attempts to create alienage jurisdiction under § 1332(a)(2). Rather they have dealt exclusively with efforts to create interstate diversity jurisdiction under what is now § 1332(a)(1). In that sense, therefore, this case is one of first impression in this Court.

2. A motive to create or manufacture diversity does not per se oust a federal court of jurisdiction.

It has often been fashionable to assume that all efforts to create or manufacture federal diversity jurisdiction are or should be condemned *per se*. But that assumption is not justified either by the theory of federal diversity jurisdiction or by the decisions of this Court. Indeed, the motive to create such a jurisdiction becomes entirely irrelevant if the factors creating that jurisdiction are in themselves lawful and proper.

The instances where jurisdiction may lawfully be created or manufactured are legion. Even the original jurisdiction of this Court may be created by a lawful transfer of a cause of action to a State. Thus in *South Dakota v. North Carolina*, 192 U.S. 286, South Dakota was permitted to invoke the original jurisdiction of this Court to compel North Carolina to honor certain bonds originally issued to individual owners. Those owners, barred by the Eleventh Amendment from suing North Carolina to compel payment, made an irrevocable gift of ten of their bonds to South Dakota "under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might enure to his benefit as the owner of other like bonds." 192 U.S. at 310. This Court not only entertained South Dakota's complaint but gave judgment to South Dakota for the value of the ten bonds, stating that "the motive with which a gift is made,

whether good or bad, does not affect its validity or the question of jurisdiction." 192 U.S. at 310. And the Court relied in part upon Chief Justice Marshall's statement in *McDonald v. Smalley*, 1 Pet. 620, 624, a case involving a transfer of land in the belief that its title would be sustained by a federal court, whereas it would not be sustained in a state court. The Chief Justice there said:

> "The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different states."

Time and again, and in a variety of contexts, this Court has reiterated the irrelevance of a motive to create jurisdiction to the actual determination of jurisdiction. In *Williamson v. Osenton*, 232 U.S. 619, the Court, through Mr. Justice Holmes, gave an affirmative answer to a certified question whether a plaintiff could gain access to a federal court in West Virginia where it was agreed that she had left West Virginia and gone to Virginia "with the intention of making her home in that state for an indefinite time in order that she might institute this suit against the defendant" on diversity grounds. Mr. Justice Holmes there said that "the motive for the change was immaterial" and that "the plaintiff had a right to select her domicile for any reason that seemed good to her." 232 U.S. at 625. Cf. *Morris v. Gilmer*, 129 U.S. 315 (access to federal court denied where party planned to move back to former home after termination of lawsuit).

A motive to create or manufacture diversity jurisdiction has likewise been deemed irrelevant where diversity resulted from dissolving a corporation and transferring all its assets to a new corporation organized under the laws of another state. Thus in *Black and White Taxicab Co. v. Brown and*

Yellow Taxicab Co., 276 U.S. 518, 524-525, in a much maligned but still authoritative opinion,[7] this Court held that the conceded motives of creating diversity jurisdiction

> ". . . which induced the creation of respondent [under Tennessee law] to become successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding their jurisdiction. *McDonald v. Smalley*, 1 Pet. 620, 624. It is enough that respondent is the real party in interest. *Smith v. Kernochen*, 7 How. 198, 216. The incorporation of respondent or its title to the business and contract in question is not impeached. Cooperation between it and the railroad company to have the rights of the parties determined by a Federal court was not improper or collusive within the meaning of § 37."

Attempts to create diversity jurisdiction by the bona fide transfer of land, contracts or other forms of property have consistently been sustained. In 1895 this Court in *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336, summarized the prior decisions on this point as follows:

> "All of them concur in holding that the privilege of a grantee or purchaser of property, being a citizen of one of the states, to invoke the jurisdiction of a circuit court of the United States for the protection of his rights as against a citzien of another state—the value of the matter in dispute being sufficient for the purpose—cannot be affected or impaired merely because of the motive [to confer or create

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[7] "This decision has been the target of universal condemnation, as the worst example of abuses of diversity possible under the rule of *Swift v. Tyson* . . . but it is still treated as authoritative in *Corabi v. Auto Racing, Inc.*, C.A. 3d, 1959, 264 F.2d 784." Wright, *Federal Courts* 86, fn. 17 (1963).

> federal diversity jurisdiction] that induced his grantor to convey, or his vendee to sell and deliver, the property, provided such conveyance or such sale and delivery was a real transaction by which title passed without the grantor or vendor reserving *or having* any right *or power* to compel or require a reconveyance or return to him of the property in question. We adhere to that doctrine." [Emphasis in original.]

And in a later summarization in 1933 in *Bullard v. Cisco*, 290 U.S. 179, 188-189, this Court said:

> "With one accord prior decisions of this Court show that the right of a transferee of corporate bonds and coupons, payable to bearer, to sue in a federal court, notwithstanding a disability of his transferrers in that regard, turns on the nature of the transfer—whether it be real or only a colorable device to enable the transferrers, through the favor and name of the transferee, to invoke a federal jurisdiction which they could not invoke in their own right."

While somewhat different considerations are involved in efforts to defeat rather than create federal diversity jurisdiction, there never having been any statutory policy proscribing any type of attempt to destroy such jurisdiction (see Note, *Devices to Avoid Diversity Jurisdiction*, 44 Harv. L. Rev. 97 (1930)), the Court has emphasized the irrelevance of such motive in sustaining these attempts. And it has done so in partial reliance on the basic doctrine respecting the irrelevance of motive established in cases involving efforts to create jurisdiction. Thus in the leading case of *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, involving the appointment of an administrator of the same state citizenship as the other party to the suit in order to prevent removal to a federal court, the Court stated (284 U.S. at 189-190):

> "But it is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon

> the questions of identity of diversity of citizenship. To go behind the decree of the probate court would be collaterally to attack it not for lack of jurisdiction of the subject matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they practiced no fraud upon it. The case falls clearly within the authorities announcing the principle that in a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined. While those cases involve a somewhat different situation,—that where a plaintiff joins defendants in order to avoid federal jurisdiction,—they are in principle applicable to the present case, where it is claimed a plaintiff was procured for the same purpose . . . The facts disclosed in this record fall far short of proof of actual fraud such as was held sufficient to justify removal in *Morris v. Gilmer*, 129 U.S. 315; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U.S. 327 . . ."

See also *Mexican Central R. Co. v. Eckman*, 187 U.S. 429; *Chappedelaine v. Dechaneau*, 4 Cranch 306. This principle of the irrelevance of motive in the lawful appointment of an administrator or guardian has been followed by a majority of the lower federal courts in permitting the creation of diversity jurisdiction through the device of securing the appointment of an out-of-state representative.[8] See, in gen-

[8] See *Lang v. Elm City Construction Co.*, 324 F.2d 235 (C.A. 2); *Stephan v. Marlin Firearms Co.*, 325 F.2d 238 (C.A. 2); *County of Todd, Minn. v. Loegering*, 297 F.2d 470 (C.A. 8); *McCoy v. Blakely*, 217 F.2d 227 (C.A. 8); *Erwin v. Barrow*, 217 F.2d 522 (C.A. 10); *Jaffe v. Phila. and Western R.R. Co.*, 180 F.2d 1010 (C.A. 3); *Fallat v. Gouran*, 220 F.2d 325 (C.A. 3); *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (C.A. 3).

The last three cited opinions of the Third Circuit were either overruled or disapproved by that court in two recent decisions rendered on October 2, 1968, *McSparran v. Weist* and *Esposito v. Emery*. A petition for certiorari is now pending before this Court, seeking review of the *McSparran* decision. No. 772, Oct. Term, 1968.

eral, Cohan and Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 Villanova L. Rev. 201 (1956).

Finally, this Court has sustained federal diversity jurisdiction as to a class action where the necessary diversity was achieved by carefully naming as representatives of the class only those whose citizenship differed from that of the opposing party, omitting those representatives whose citizenship was identical with that of the opposing party. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356. The fact that the representatives were named with a deliberate eye toward creating diversity was not even deemed worthy of consideration. The same principle has been followed in stockholders' derivative suits where the only named stockholders are chosen so as not to include any who are citizens of the same state as the corporation or other named defendants. See Wright, *Federal Courts* 87 (1963).

In sum, the controlling principle repeatedly enunciated and followed by this Court is that the right of a party to invoke the diversity jurisdiction of a federal court cannot be affected or impaired merely because of a motive to create the jurisdictional conditions necessary to such invocation. If the device utilized to create those conditions be lawful and bona fide, the motivation becomes quite irrelevant to the determination of federal diversity jurisdiction. And it makes no difference what form the device may take, be it a sale, a transfer, a gift, an assignment, a court appointment, a change of domicile, or a selective naming of parties to the suit.

It follows, therefore, that the intention and motive in this case to create alienage diversity through the assignment of the agreement of May 30, 1959, and the cause of action thereunder cannot *per se* operate to oust the federal district court below of jurisdiction. As will become apparent hereinafter, that assignment was made for a valuable consideration so as to terminate the pecuniary interest of the assignor in the subject matter of the transfer. In such circumstances, "it makes no difference that by such transaction the trans-

feree acquired the advantage of suing in the federal court." *Cross v. Allen*, 141 U.S. 528, 533. Nor can it be said that such an assignment or such a motivation brings this case "within the class of collusive cases" so as to "require its dismissal at the hands of the federal court, on jurisdictional grounds." *Ibid.*, 533.

3. The existence of a valid assignment has been established by (a) the controlling law of Texas, (b) the findings of the jury, and (c) the determination of the trial judge.

The validity of the assignment in this case becomes a critical element in the establishment of the alienage jurisdiction invoked by the petitioner Kramer. That validity has been made evident by the relevant state law and affirmed by the findings of the jury and the determination of the District Court. And the assignment was of a contract that, being binding on "assigns," obviously contemplated the possibility of being assigned. Pl. Ex. 1.

The assignment itself, dated September 21, 1964, provided that Panama and Venezuela Finance Company did assign, sell and convey to the petitioner Kramer "all of our right, title and interest," including all actions, causes of action and claims, arising out of the original tripartite agreement of May 30, 1959. App. 13. The assignment further recited that the consideration consisted of "One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged." App. 13. No rights in the original agreement were reserved to Panama. This assignment was duly executed by Panama and delivered to Kramer's counsel. App. 17.

The collateral agreement executed simultaneously with the assignment referred to the fact that Panama "for valuable consideration" had "irrevocably assigned, sold and conveyed to Clayton S. Kramer all of its right, title and interest under and arising out of" the original tripartite agreement. App. 15. And this collateral agreement indicated that "the said Clayton S. Kramer is now the sole owner of any action

or causes of action derivative therefrom, with the independent right of management, control and prosecution thereof, and does hereby indemnify and hold harmless the Panama and Venezuela Finance Company free from cost or expense that has or may arise out of the prosecution of any demand or suit on said contracts." App. 15. The 95 per cent "bonus" was made payable to Panama only after Kramer had assumed the management, control and burden of any legal action to enforce the assignment agreement, had obtained a recovery, and had paid the appropriate attorney fees and expenses.[9]

Both the assignment and the collateral agreement were expressly made subject to the laws of the State of Texas, it being specified in each document that if any question arose as to the validity or meaning of the respective instrument "the laws of the State of Texas" should control. App. 14, 16.

The controlling "laws of the State of Texas" fully sustain the validity and effectiveness of this transfer to Kramer of all of Panama's interest in the original tripartite agreement.[10] At the time of this assignment in 1964, Texas

[9]According to Kramer's testimony, this 95 per cent "bonus" was arranged because "I did not want to put up any cash to purchase the claim" and "I would prefer not to borrow a large sum of money for it." App. 45. He did not expect Panama just to "take it all for the $1 plus your promises to prosecute the claim, plus your indemnity agreement" and, after discussing the matter with his counsel, Kramer decided that "one way to do it—was by paying a bonus." App. 57. The "bonus" was thus viewed as a form of deferred consideration for the assignment, in lieu of an immediate and outright cash payment from Kramer's own funds or from borrowed funds.

[10]Generally, the question of the validity of an assignment is a question of local law. *Blair v. Commissioner*, 300 U.S. 5, 9. And in determining the validity of an assignment in the context of jurisdictional problems, federal courts look to relevant state law. See *American Fidelity & Casualty Co. v. All American Bus Lines*, 179 F.2d 7, 10 (C.A. 10); *McWhirter v. Otis Elevator Co.*, 40 F.Supp. 11 (D.C.S.C.); *Ishmael v. City Electric of Anchorage*, 91 F.Supp. 688 (D.C. Alas.); *Petrikin v. Chicago, R.I. & P.R. Co.*, 15 F.R.D. 346 (D.C. Mo.). See also *Martineau v. City of St. Paul*, 172 F.2d 777 (C.A. 8).

provided by statute (Art. 569, Vernon's Ann. Tex. Civil Stat.) that "The obligee or assignee of any written instrument not negotiable by the law merchant, may, by assignment transfer all his interest therein to another." See *Central Power & Light Co. v. Purvis*, 67 S.W.2d 1086 (Tex. Civ.App.); *Dittman v. Model Bakery*, 271 S.W. 75 (Tex. Comm.App.). And further, by the terms of relevant Texas statutory law (Art. 570, Vernon's Ann. Tex. Civil Stat.), "The assignee of any instrument mentioned in . . . [Art. 569] may sue thereon in his own name." See *Pecos & N.T.R. Co. v. Porter*, 156 S.W.2d 267 (Tex.Civ.App.); *Young v. Bank of Miami*, 161 S.W. 436 (Tex.Civ.App.).[11]

As to the Texas rule respecting the validity of an assignment, Texas courts have consistently held that where the parties intend to transfer the rights of the assignor and where delivery of the instrument, either actual or symbolic, is accomplished, a completed and valid assignment has been made. *Ross v. Smith*, 19 Tex. 171; *Neely v. Grayson County National Bank*, 61 S.W. 559 (Tex.Civ.App.). Such an intent and delivery are sufficient to transfer title and to evidence a bona fide assignment even though the assignee may have paid no consideration. *Pearce v. Wallis, Landes & Co.*, 124 S.W. 496, 497 (Tex.Civ.App.); *Kenedy Town & Improvement Co. v. First National Bank*, 136 S.W. 558, 561 (Tex. Civ.App.). In the instant case, of course, there was a coalescence of an intent to assign, actual consideration and a delivery of the assignment instrument.

Texas thus follows the general rule that "Lack of consideration for the assignment is immaterial . . . for the law is

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[11] In 1966, more than a year after the assignment in question, Articles 569 and 570, quoted above, were among those repealed by the adoption by the Texas Legislature of the Uniform Commercial Code, which was in turn repealed in 1967 and replaced by the Business and Commerce Code. Such repeal did not affect the validity of any assignment made prior to the adoption of either Code and, indeed, there has been no change in the principles embodied in Articles 569 and 570. See Vernon's Legislative Session Law Service Pamphlet No. 6 (1967).

well settled that the assignment of an entire chose in action is valid and irrevocable after delivery though made without consideration." *Globe Indemnity Co. v. Puget Sound Co.*, 149 F.2d 805, 809 (C.A. 2); see also *Chase National Bank v. Sayles*, 11 F.2d 948 (C.A. 1). As expressed in the leading Texas decision on this point, *Hughes v. Dopson*, 135 S.W.2d 148, 149-150 (Tex.Civ.App.):

> "The notes had been duly assigned to appellant by the receiver of the bank and he had a right to bring and maintain suit thereon regardless of the amount of consideration paid by him or, in fact, whether or not he had paid anything at all as consideration therefor. By virtue of the assignments he became the legal owner and holder of the notes.
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> "There was neither pleading nor evidence tending to question the validity of the assignments and the law is well established that, by virtue of the assignments, regardless of whether he paid a valuable consideration for the notes or not, appellant had the right to maintain the suit and the question of whether he paid a valuable consideration was wholly immaterial. Durst v. Swift, 11 Tex. 273; Continental Oil & Cotton Co. v. E. Van Winkle Gin & M. Works, 62 Tex.Civ.App. 422, 131 S.W. 415."

It is also well established by Texas case law that an obligor under a contract that has been assigned, such as the respondent Caribbean Mills, cannot and should not be concerned with the amount of consideration, if any, that passed between the assignor (Panama) and the assignee (Kramer). The theory of this principle is that, regardless of the value paid for the assignment, the obligor still owes whatever is due under the assigned contract and he can still assert against the assignee any defense he may have to the contract claim; hence the obligor can suffer no possible legal harm by being foreclosed from questioning the sufficiency of the consideration for the assignment. Thus in *F. H. Vahlsing, Inc. v. Hartford Fire Insurance Co.*, 108 S.W.2d 947, 951 (Tex.Civ. App.), the court ruled:

> "An assignee of a chose in action who sues the assignor in respect thereof must show that a consideration passed. This is upon a principle well settled in the law of contracts. But if the action is against the original obligor, the assignee may recover without such a showing, consideration for the transfer being no affair of the obligor, for it can make no difference to him whether recovery is by the assignor or by the assignee."

This principle has been reiterated many times by Texas courts, dating back as far as 1854 when *Durst v. Swift*, 11 Tex. 273, held that it was not necessary for the assignee in a suit against the obligor to prove the consideration paid for an assignment even though the assignment had not been executed under seal (a prime requirement in those early days). In *Quinn v. McCurdy*, 187 S.W.2d 595, 597 (Tex. Civ.App.), the court ruled that "The suit being against the obligor, the assignee of the chose in action was not required to show consideration for the assignment," despite the obligor's contention that "the evidence shows no consideration for the assignment." In *General Office Service Co. v. Ledbetter*, 221 S.W.2d 932 at 932 (Tex.Civ.App.), it was repeated that "Since the appellee was the original obligor, the question as to the consideration for the assignment was immaterial." And in *Glass v. Carpenter*, 330 S.W.2d 530, 537 (Tex.Civ.App.), it was again said that "In a suit by the assignee on a claim against the obligor, . . . the defense of lack of consideration for the assignment [cannot] be urged by the obligor in a suit on the assigned claim."

Texas law thus makes plain that the assignment in this case was valid and binding upon the execution and delivery of the assignment instrument, it being the intent of both assignor and assignee that all of Panama's rights in the assigned contract be irrevocably transferred to the petitioner Kramer. That such generative facts did take place is obvious not only from the documentary record but from the jury's affirmative findings, from a preponderance of all the evidence, that Panama did assign all of its $165,000 interest

in the tripartite agreement to Kramer. App. 78 (Special Issue Nos. 2 and 2-a). The District Court's considered determination that the assignment "was good on its face" is confirmatory of its compliance with Texas law. App. 12.

The assignment, moreover, was supported by adequate consideration, even assuming such consideration were required under Texas law to validate the assignment. The assignment itself recited that it was supported by a consideration amounting to "One Dollar ($1.00) and other good and valuable consideration."[12] App. 13. That dollar was in fact paid. App. 47. But the one dollar was not the sole consideration. As specified in the collateral agreement, Kramer also agreed to assume the management, control and burden of any lawsuit to enforce the assigned contract and to indemnify and hold harmless the assignor from any obligations arising out of the enforcement of the contract. And there was the deferred "bonus" payment to Panama from the net proceeds of any recovery. The sum of these various items constituted more than adequate consideration for the assignment.

But if Texas law is to be respected in this diversity litigation in regard to the legality of an assignment executed under "the laws of the State of Texas," respect must be accorded the firm Texas rule that an intent to transfer rights, when accompanied by delivery of an assignment instrument, results in a valid and complete assignment even where no consideration is paid. And particularly in a suit between an assignee and the original obligor, Texas law makes the question of consideration or its adequacy entirely irrelevant and indeed not even open to inquiry. It thus becomes idle to speculate whether the one dollar or the other specified items constituted adequate consideration or whether the deferred "bonus" of 95 per cent of the net

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[12] See *City of Eufaula, Alabama v. Pappas*, 213 F.Supp. 749, 750 (D.C. Ala.): "While it is true that the consideration for the transfer to Zafero P. Paterson was the sum of $1, this under the law of Alabama suffices to support the transfer."

recovery drained the transaction of true consideration. To give the assignment the same effect it would be given by a Texas court is to recognize the total validity of this assignment.

The conclusion is inescapable that (1) as the trial judge here found, the assignment "was good on its face," (2) as the jury here found, Panama intended to, and did in fact, transfer all of its $165,000 interest in the tripartite agreement to Kramer, and (3) as Texas law makes clear, the assignment was valid and effective upon its execution and delivery, even without regard to the adequacy of the consideration. Respect for Texas law as well as for the findings of judge and jury permits no other rational conclusion. The Fifth Circuit's failure to adopt that conclusion cannot be justified.

4. The execution of an assignment valid under state law, even when done to create diversity jurisdiction, is not collusive or improper within the meaning of 28 U.S.C. § 1359.

It is with the foregoing considerations in mind that the ultimate question in this case must be faced: can an assignment of a contract and a cause of action thereunder, which assignment is valid under controlling state law and yet was motivated in substantial part by a desire to create alienage diversity, be deemed collusive or improper within the meaning of 28 U.S.C. § 1359? Section 1359, it will be recalled, bears the heading "Parties collusively joined or made" and provides that

> "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

An appreciation of the thrust of § 1359 must begin with an understanding of its historical antecedents. Its origin is to be found in the famous assignee clause of the Judiciary Act of 1789, Sec. 11, 1 Stat. 79, which was designed to ex-

clude from federal courts virtually all suits by assignees of promissory notes or other choses in action unless such suits could have been prosecuted in those courts by the assignors as if no assignments had been made. More specifically, this clause provided that no district or circuit court was to have

> "... cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

With changes in language, this assignee clause remained a part of federal law until 1948, when it was dropped in the course of revising the Judicial Code.[13] The successive amendments to the clause in the intervening years had resulted in an increased amount of "obscure phraseology" and it became known as a "jumble of legislative jargon."[14] A large and highly technical body of decisions had arisen, attempting to sift through the muddled statutory language. The most prominent difficulty with the clause was its indiscriminate outlawry of all suits on assigned claims within its scope, including those where the assignment itself was entirely bona fide; at the same time, the clause did not bar

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[13] In its final version, § 41(1) of the 1940 edition of Title 28 of the United States Code, this assignee clause provided that "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

[14] The quoted phrases appeared in a Comment, *Chaos of Jurisdiction in the Federal District Courts*, 35 Ill. L. Rev. 566, 569, 570 (1941), and were referred to approvingly in the Reviser's Notes to § 1359 of the 1948 Judicial Code. See also Dobie, *Jurisdiction of the United States Courts as Affected by Assignment*, 6 Va. L. Rev. 553 (1920).

suits based upon non-bona fide assignments that fell outside the highly artificial boundaries set by the statute. See Wright, *Federal Courts* 85 (1963); 3A *Moore's Federal Practice* 201-205 (2d ed., 1967).

In the meantime, at about the three-fifths mark in the lifespan of the assignee clause, the Act of March 3, 1875, 18 Stat. 470, became effective. In Sec. 1 of that Act, Congress once again amended and re-promulgated the assignee clause. But Sec. 5 of the Act contained an entirely new and independent approach to the problems involved in efforts to invoke the diversity jurisdiction of federal courts. That section provided that:

> "If, in any suit commenced in a Circuit Court or removed from a State Court . . . it shall appear to the satisfaction of the Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the State Court from which it was removed, as justice may require . . ."

This provision remained on the federal statute books in substantially the same form until the 1948 revision of the Judicial Code, being last known as Sec. 80 of the 1940 edition of Title 28 of the United States Code.

The 1948 revision of the Judicial Code, out of which the present § 1359 was born, made several significant changes in the pre-existing statutory patterns:

(1) The assignee clause as such was dropped completely.[15]

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[15] The Reviser's Notes state that the assignee clause had become "a jumble of legislative jargon." Reference was made to this Court's

(2) Also omitted was the first portion of Sec. 5 of the 1875 Act, known in 1948 as Sec. 80 of Title 28, referring to the dismissal of a suit whenever it appears "that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction" of the federal court.[16]

(3) Retained and recast into the present § 1359 was the second portion of Sec. 5 of the 1875 Act, known to the revisers as Sec. 80 of Title 28, relative to the dismissal of a suit whenever it appears that the parties have been improperly or collusively made or joined for the purpose of creating a case within the jurisdiction of the federal court. The words "by assignment or otherwise" were added to make plain the broad scope of "collusive" devices. In selecting this provision for retention in lieu of the other then existing provisions, the Reviser's Notes state that "Its coverage against collusive jurisdiction is unlimited, and its approach is direct."

From the bare bones of this statutory reshuffling, one critical factor emerges that dispels the rather common misconception that the purpose and effect of § 1359 are to outlaw all efforts to create diversity jurisdiction through assignments. It has been said, by a most respected authority, that since the assignee clause "often defeated diversity jurisdiction without regard to the motivation of jurisdiction," the 1948 revisers felt that the proper principle "should be to deny diversity only where the assignment was

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statement in *Sowell v. Federal Reserve Bank*, 268 U.S. 449, 453, that the purpose and effect of the clause, "at the time of its enactment, were to prevent the conferring of jurisdiction on the Federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist." The Reviser's Notes state that this purpose "is better served by substantially following said section 80."

[16]The Reviser's Notes state simply that this provision was "omitted as unnecessary" since "Any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion." Hart and Wechsler, in *The Federal Courts and the Federal System* 721 (1953), have posed this question about this particular omission: "Were the revisers well-advised in what they did?"

motivated by the creation of diversity jurisdiction" and that "Accordingly, the assignee clause was repealed and former § 80 was modified expressly to include assignments." 3A *Moore's Federal Practice* 151 (2d ed., 1967).

But there is not one word in the Reviser's Notes to indicate that the revisers felt that diversity should be denied whenever or solely because an assignment was motivated by the creation of such jurisdiction. On the contrary, their prime concern was to make certain that "collusive" attempts to create diversity jurisdiction would be proscribed; and to that end they chose to perpetuate that portion of the 1875 Act that withheld jurisdiction only where an attempt was made to invoke diversity by "improperly or collusively" making or joining a party.

In other words, § 1359 is merely a continuation of the pre-revision doctrine that diversity jurisdiction is not to be denied merely because the device making diversity possible was motivated by a desire to create such jurisdiction. Had the framers of § 1359 intended to outlaw naked attempts to create diversity, by assignment or otherwise, they could have done so simply by omitting the words "improperly or collusively" from the recodification. See comments of Chief Judge Biggs in *Corabi v. Auto Racing, Inc.*, 264 F.2d 784, 788 (C.A. 3). Instead, they copied the long-existing prohibition of *collusive* or *improper* means to achieve diversity. Thus standing alone and apart from any collusive implementation, a motive to create diversity through an assignment or other device is not the *sine qua non* of § 1359. Cf. *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 153.

Still another significant factor emerges from the 1948 rearrangement of the diversity mosaic. The revisers expressly thought it unnecessary to retain the provision of the 1875 Act that had dictated the dismissal of an action "not really and substantially involving a dispute or controversy within the jurisdiction" of the court. But unnecessary or not, those words were omitted from § 1359. And they were words which shed much meaningful light upon the

"improper" and "collusive" terminology as used prior to 1948. As was said recently by the Third Circuit,[17] in attempting to find specific content to give to the words "improperly" and "collusively" as now used in § 1359,

> "While the preliminary words of § 37 [the 1911 version of Sec. 5 of the 1875 Act] no longer appear in § 1359, we believe they give content to its otherwise indefinite and ambiguous words 'improperly' or 'collusively'. They say in effect that a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named."

It is dubious whether such deliberately omitted language can properly be used to cast light on words still remaining in effect. What is significant, however, is the implicit recognition by the Third Circuit that in the absence of the excised words of Sec. 5 of the 1875 Act, the terms "improperly" and "collusively" can no longer be considered as necessarily incorporating the notion of a device whereby a nominal party who has no real or substantial interest in the controversy is designated for the purpose of creating diversity.[18] As the revisers themselves recognized, a federal court can always dismiss a case that is not within its jurisdiction or that does not involve a party having a real or substantial interest in the controversy. But, by relegating the real and substantial controversy concept to the inherent powers of federal courts, the revisers may well have effectively removed that concept from the present reach of the "improperly or collusively" language.

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[17] *McSparran v. Weist*, as yet unreported, No. 16793, C.A. 3, Oct. 2, 1968, now pending before this Court on petition for a writ of certiorari, No. 772, Oct. Term, 1968. See footnote 8, *supra*. The quotation from the opinion appears at page 28 of the appendix to the petition in No. 772.

[18] To repeat the query of Hart and Wechsler, see footnote 16, *supra*, "Were the revisers well-advised in what they did?"

In thus restructuring § 1359, the revisers can be said to have rendered somewhat impotent, for § 1359 purposes, the precedential value of certain pre-revision decisions of this Court which had considered the collusive concept in the context of the now-omitted language concerning real and substantial controversies. In *Miller & Lux v. East Side Canal & I. Co.*, 211 U.S. 293, for example, the formation of a new out-of-state corporation for the sole purpose of invoking diversity jurisdiction was deemed "feigned or merely colorable" and hence collusive where the lower court had already found that the suit "did not really and substantially involve a dispute or controversy within the jurisdiction of that court." 211 U.S. at 298.

It is within this historical and narrowed framework of § 1359 that the search must now be made for the proper content of the concepts of impropriety and collusiveness, at least to the extent made necessary by the circumstances of this case. By common consent, those concepts as used in § 1359 appear to be ambiguous and indefinite. Lower courts have differed widely as to their meaning and scope. As the Tenth Circuit said in *Bradbury v. Dennis*, 310 F.2d 73, 74-75:

> "Our difficult problem is one of ascertaining their true jurisdictional meaning at the time of the revision. As words used to delineate jurisdiction, they ought to be cast in black and white, but we find them in the decisional gray zone. Though words of general import, and no strangers to the law, they are nevertheless words of art when used to define or delineate federal court jurisdiction. They are used in the disjunctive and are evidently intended to define different and varying jurisdictional barriers."

To determine whether an assignment or transfer is "improper" or "collusive" it is not enough to turn to such labels as "fictitious or pretended," *Miller & Lux v. East Side Canal & I. Co.*, 211 U.S. 293, 304, or "nominal and colorable," *Smith v. Kernochen*, 7 How. 198, 216, or "a

mere contrivance, a pretense," *Detroit v. Dean*, 106 U.S. 537, 541. What "we need to know [is] by what standards we shall determine when an assignment or transfer is 'fictitious,' 'colorable' or 'spurious,' hence improper or collusive." *Bradbury v. Dennis, supra*, 75.

But out of this welter of confusion and labels emerge certain statutory considerations that can be translated into meaningful content for the phrase "improperly or collusively," considerations that also demonstrate that the assignment in this case was not of the type that § 1359 was meant to encompass.

(1) As is true with respect to any statute, resort must first be had to the words of § 1359 itself, the words "improperly or collusively." Those words, "[w]hatever the reason," must be presumed to "mean what they say." *Singer v. United States*, 323 U.S. 338, 346.

The word "improper" or "improperly," as Chief Judge Biggs noted in his *Corabi* opinion, 264 F.2d at 788, clearly connotes impropriety and is defined by Webster to mean "Not suited to the circumstances, design, or end; not appropriate, fit, or congruous; as, an *improper* medicine; *improper* dress."

As to the term "collusive" or "collusively," this Court in *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190,[19] defined the concept of collusion as implying "the existence of fraud of some kind, the employment of fraudulent means or of lawful means for the accomplishment of an unlawful purpose." And the Court also resorted to the Bouvier definition of collusion as "an agreement between two or more persons to defraud a person of his rights by the forms of

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[19] While the Court in the *Dickerman* case was directly concerned with defining collusion in the context of the nonpayment of an allegedly collusive judgment operating as a mortgage default, the Court specifically analogized the definition problem before it to that involved in determining whether a transaction is collusive so as to oust a federal court of jurisdiction. 176 U.S. at 191-192.

law, or to obtain an object forbidden by law." See also *United States v. Johnson*, 319 U.S. 302, 305 (a collusive suit "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated"). And as Chief Judge Biggs stated in *Corabi*, 264 F.2d at 788, the word "collusion" is generally employed "to indicate an illegal agreement or understanding between opposing sides of a litigation rather than to an arrangement effected by one side of the sort at bar."[20]

Given the plain meaning of these statutory words, the assignment in this case cannot be described as a device for "improperly or collusively" making the petitioner Kramer a diverse party plaintiff. The assignment, as has been demonstrated, fully complied with state law and no effort has been made in this case to impeach the validity of that assignment. The fact that one of its purposes was to create diversity cannot, under the repeated decisions of this Court, serve to create an object forbidden by law. There was no element of impropriety in the assignment transaction, both the assignor and the assignee acting in what each conceived to be his best interests. Certainly they did not act, secretly or otherwise, to defraud the respondent Caribbean Mills of any of its rights or defenses. In short, as was said in *Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.*, 276 U.S. 518, 525, "Co-operation between . . . [Panama and Kramer] to have the rights of the parties determined by a Federal court was not improper or collusive within the meaning of § 37 [now § 1359]."

(2) The concepts of collusion and impropriety, when viewed in light of the purpose and policy of § 1359, obviously convey strong overtones of fraudulent and illegal conduct by the parties involved. In referring to the 1875 prede-

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[20] "If we accept the dictionary definition . . . the word 'improperly' broadly covers any act or conduct deemed unsuited to the circumstances of the case, while the word 'collusively' is a stronger word with a more restricted meaning indicating a secret agreement for a bad purpose." *Bradbury v. Dennis*, 310 F.2d 73, 75 (C.A. 10).

cessor of § 1359, this Court has said that the withdrawal of jurisdiction dictated by the statute "was for the protection of the court as well as parties against frauds upon its jurisdiction; for as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney v. Baltimore*, 6 Wall. 280, 288, such transfers for such purposes are frauds upon the court, and nothing more." *Williams v. Nottawa*, 104 U.S. 209, 211.

But a fraud perpetrated on a court implies something more evil than a lawful transaction by which "the transferee acquired the advantage of suing in the federal court." *Cross v. Allen*, 141 U.S. 528, 531. It implies some sort of fraudulent experiment upon the jurisdiction of the court, an experiment that might well subject the perpetrators to censure if not contempt. Such a fraud may be present, for example, where there is proof that a false or fictitious state of facts was submitted to the court or where there is an absence of a genuine adversary issue between the parties, without which a court may not safely proceed to judgment. See *United States v. Johnson*, 319 U.S. 302. Or the device used to create the necessary diversity may be illegal or fraudulent in its inception or contrary to relevant state law. None of those indicia of fraud is here present, however.

(3) The statutory notions of collusion and impropriety are plainly not applicable to a transaction that fully satisfies the controlling requirements of state law. To state that proposition is not to disparage the rule that federal courts are the exclusive judges of their own jurisdiction. *Missouri P.R. Co. v. Fitzgerald*, 160 U.S. 556. But when federal jurisdiction is to be weighed in terms of the collusive or fraudulent action of one of the parties, and when that collusion or fraud relates to the propriety of a transaction whose legality can be tested only by reference to state law, compliance with state law becomes not only relevant but dispositive of the collusion issue. Indeed, it was the sanction of state law underlying the corporate transactions in the *Black and White* case that permitted this Court to find

those transactions non-collusive. See *Bradbury v. Dennis*, 310 F.2d 73, 76 (C.A. 10). And in the instant case, the assignment transaction was so completely in compliance with applicable Texas law that no challenge to that transaction has ever been raised. Not even the Fifth Circuit could find any legal fault in the assignment.[21]

(4) In many of the pre-revision decisions of this Court, collusion or impropriety was premised upon a judicial determination from the record that a particular transaction was lacking in consideration or failed to transfer of all the transferor's right or interest in the subject matter or left the transferor in complete control of the federal court litigation. See, e.g., *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327; *Farmington Village v. Pillsbury*, 114 U.S. 138;[22] *Miller & Lux v. East Side Canal & I. Co.*, 211 U.S. 293; *Detroit v. Dean*, 106 U.S. 537; *Little v. Giles*, 118 U.S. 596.

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[21] It was said in *Bradbury v. Dennis*, 310 F.2d 73, 76 (C.A. 10), that "Certainly diversity jurisdiction should not be made to depend on whether some one can pick a legal flaw in the transaction by which jurisdiction is conferred. It should not be made to depend upon or await adjudication of the legality of the transaction under state law. All this means that the state of the law is left in the gray zone where we found it."

[22] The *Farmington* case involved certain bonds issued by a village, bonds that had been held invalid by the Maine courts. Thereafter some of the Maine bondholders transferred their coupons to a Massachusetts plaintiff under an arrangement by which the latter gave a promissory note for $500, payable in two years, "as a further consideration for said coupons." If he succeeded in collecting the full amount of the bonds he was to pay the original owers 50 per cent of the net amount collected above the $500. The Massachusetts transferee then brought suit in a federal court in Maine. The case came to this Court on special findings by the federal court below, there having been no jury and the judges below having certified a division of opinion among them. This Court found from the record that there had been no consideration paid for the bonds and that the original bondholders intended to keep control of the whole matter in their own hands "so that if the plaintiff failed to recover the money he could be released from his promise to pay." The case was found to be collusive and hence dismissable under Sec. 5 of the 1875 Act.

To the extent that such factors may be considered relevant in defining the "improperly or collusively" terminology of the modern § 1359, the record in this case, as had been shown, reveals (a) adequate consideration in the form of the one dollar, the independent management and control of the lawsuit, the indemnification promise, and the deferred 95 per cent "bonus," (b) an irrevocable assignment and conveyance of all of Panama's right, title and interest in the original tripartite agreement, and (c) sole ownership in the petitioner Kramer of the cause of action "with the independent right of management, control and prosecution thereof."

Of at least equal importance, however, is the fact that the jury and the trial judge, after consideration of all the facts of record (including the terms and the testimony concerning the collateral agreement), both concluded that a complete and effective assignment had been made to Kramer by Panama of all of its $165,000 interest in the tripartite agreement. This Court once said, with particular reference to Sec. 5 of the 1875 Act, that the statutory provision here in question "confers [on a federal court] a beneficial authority to be wisely exercised in defeating collusive and fraudulent experiments upon its jurisdiction; but the discretion it confers is judicial, proceeding upon ascertained facts according to rules of law, and subject to review for apparent errors." *Barry v. Edmunds*, 116 U.S. 550, 566. The court, in other words, must exercise "a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law," and those facts must be "made distinctly to appear on the record." *Ibid.*, at 559.

Adherence to that principle would mean that, in the administration of § 1359, great weight must be attached to the considered findings of the triers of fact and that it does not lie in the power of an appellate court to ignore those findings and to make its own *de novo* determinations as to such factual matters as the existence of consideration, the

intent to transfer and the actual transfer of interests, and the control of lawsuits; at least where, as here, there is substantial evidence to support the findings of the triers of fact.

In this respect, this case is unlike any of the pre-revision cases resolved by this Court. In none of them was there so complete a jury inquiry, aided by special interrogatories, into the critical facts upon which the ultimate determination as to "collusion" was to be based; nor in any of them was there an additional confirmatory determination by the trial judge. And most certainly none of those prior cases involved the action of an appellate court ignoring both the trial judge's determination and the jury findings and making its own determinations of fact—as the Fifth Circuit here did. For that reason alone, this case is unique, and significantly so.

The Fifth Circuit erred not only in its determination that the assignment was a collusive device within the meaning of § 1359 but also in its refusal to accord any respect or weight to the findings of either trial judge or trial jury.

CONCLUSION

For these various reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and the case remanded for further appropriate proceedings.

Should this Court disagree with that conclusion and decide to affirm the judgment below, the petitioner requests that such a ruling be made prospective in effect so as to avoid hardship to this petitioner. There has been no direct precedent under § 1359 involving the jurisdictional matters here at stake, particularly in terms of attempts to invoke alienage diversity. Petitioner reasonably believed that he had a right to invoke federal jurisdiction, a belief affirmed by the District Court, and a substantial expenditure of judicial time and energy ensued. A determination of the merits ensued after a full jury trial. To preserve that expenditure in this instance would be fair to both

parties who have participated in litigating the merits of the controversy and would permit any ruling by this Court to be fully effective as to future litigation.

Moreover, to remand the petitioner to his state court remedies, if any, would subject him to the risk of dismissal as to the installment claims under the contract that have accrued four years or more ago, Texas having a four-year statute of limitations on such claims (Art. 5527, Rev. Civil Stat. Tex.). The first of those installments accrued on June 1, 1962. App. 4. It was precisely to avoid this type of unfairness that the Third Circuit, in recently announcing a new rule prohibiting the creation of diversity jurisdiction through the appointment of a guardian, declared that its new rule was to be prospective only. That new rule, said the Third Circuit, "shall apply to all causes of action which arise after the date of the filing of this opinion," but as to causes of action arising prior to that date the new rule shall apply "only where the court finds in the circumstances of the particular case there is ample time and opportunity for the plaintiff to institute a new action in the state court and that no unreasonable burden will be imposed on the plaintiff by the dismissal of the federal action." *McSparran v. Weist*, as yet unreported, C.A. 3, October 2, 1968, now pending on petition for writ of certiorari, No. 772, Oct. Term, 1968.

The petitioner repeats, however, that the judgment below should be reversed *in toto*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 156

CLAYTON S. KRAMER,

Petitioner,

—v.—

CARIBBEAN MILLS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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January, 1969

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IN THE

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OCTOBER TERM, 1968

No. 156

CLAYTON S. KRAMER,

Petitioner,

—v.—

CARIBBEAN MILLS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether Section 1359 of the Judicial Code precludes the creation of diversity of citizenship jurisdiction through an assignment of a disputed claim which, for the sake of argument, may be assumed to vest technical legal title to the claim in the assignee under state law, but which is accompanied by a collateral agreement under which the assignee agrees to pay 95 percent of the net recovery on the claim to the assignor, and where the assignment was admittedly made with the motive of gaining access to the Federal court by creating diversity jurisdiction.

STATEMENT

A dispute over a contract arose between Panama and Venezuela Finance Company ("Panama"), a Panamanian corporation, and the respondent, Caribbean Mills, Inc. ("Caribbean"), a Haitian corporation.[1] The controversy related to whether Caribbean was required to make certain annual installment payments, commencing on June 1, 1962, on the contract. (App. 3-5, 7-8) Caribbean's position was that certain events occurring concurrently with and subsequent to the execution of the contract in 1959 had extinguished any obligations which it had to make the annual payments. Panama made prompt demand for payment of the annual installment allegedly due it on June 1, 1962, and Caribbean refused to pay. Subsequent annual installment payments have likewise not been paid.

By September, 1964, three of the annual payments allegedly due from Caribbean to Panama had not been paid. In that month, after certain negotiations conducted by one Jack Banner, a Wichita Falls, Texas, attorney at law, Panama executed and delivered to one Clayton S. Kramer, another Wichita Falls attorney, an assignment (the "Assignment") in the form set forth at pages 7-9 of petitioner's brief and pages 13-14 of the Appendix. Kramer had had absolutely no prior acquaintance with any of the parties to, or the subject matter of, the contract. (App. 31-32) In the Assignment, it was recited that "for and in con-

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[1] Originally a third person, one Kelly, a citizen of the United States, was also a party to the contract. Caribbean took the position that certain actions of Kelly and Panama extinguished Caribbean's liabilities under the contract. (App. 8-9) On the other hand, since Kelly and Panama were originally joint obligees of Caribbean under the contract, Panama's position depends on an assignment which it asserted Kelly made to it. (App. 4, 77)

Caribbean is a manufacturer of flour and flour by-products, operating a mill at Port-au-Prince, in Haiti. (App. 70; R. 99)

sideration of One Dollar ($1.00) and other good and valuable consideration"[2] Panama assigned to Kramer all of its "right, title and interest, including all actions, causes of actions, claims, right to make demands, right to designate place of performance and payment, monies due and/or to become due, arising from or out of" the contract in dispute. (App. 13)

Simultaneously, however, Kramer and Panama executed a secret side agreement (the "Side Agreement"). The Side Agreement is set forth at pages 9-11 of the petitioner's brief and at pages 15-16 of the Appendix. In the Side Agreement, it was agreed that Kramer would pay back to Panama 95 percent of the net recovery, after deduction of attorneys' fees and costs, obtained from Caribbean under the contract which had been assigned. Of the net recovery, Kramer was only to "retain five (5) per cent for his own use and benefit."[3]

The Side Agreement also recited an agreement on Kramer's part to make demand under the contract and to make collection or prosecution of all claims thereon. It also restricted the attorneys' fees and expenses which Kramer could incur in the prosecution of the claims. A contingent fee was contemplated under the Side Agree-

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[2] The record is to the effect that while the dollar was paid, no other consideration passed except to the extent that the undertakings of Kramer set forth in the side agreement with respect to the claim could be said to be consideration. (App. 47)

[3] There is no explanation in the record of why it was that the entire agreement between the parties, embraced in the Assignment and the Side Agreement, was not united in a single instrument. It is the unfortunate fact that one reason why people sometimes express a single, integrated agreement in two written instruments is so that part of the overall arrangement may be produced without the remainder. As will be seen at pages 5-7, *infra*, this was done here.

ment. Kramer agreed in the Side Agreement that Panama would not have to bear the expenses of suit. However, as previously indicated, this did not preclude deduction of a contingent fee and expenses from the proceeds of a successful suit, and such a deduction was expressly contemplated. (App. 15-16)

Kramer had first heard of the contract between Panama and Caribbean in 1964 when he had a talk with another attorney in Wichita Falls, Jack Banner, who was then briefing a legal point, obviously for Panama, concerning the enforcement of the alleged unpaid obligations under the contract. Banner mentioned to Kramer that "there might be a claim that could be acquired" by Kramer.[4] (App. 34-

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[4] Kramer was hardly what one could describe as a spontaneous witness with respect to these episodes. Some idea of this may be gathered from the following passages from his testimony with respect to this aspect of the matter:

"Q. Now, state the circumstances of your being advised of the existence of this contract.

"A. As well as I can recall it was in the early part of the summer of 1964, and I was talking to Mr. Banner, as we frequently did and still do, and he brought the subject up. Now, he didn't bring up the subject of this specific contract, he brought up the subject of the claim and the fact that there might be a claim that could be acquired.

"Q. Did he tell you that he was doing some briefing in connection with the claim?

"A. I think—in connection with the claim—no, sir. I don't believe he did.

"Q. Did he tell you he was doing some briefing in connection with this contract?

"A. I could see he was doing some briefing.

* * * * *

"Q. Did he tell you that Mr. Cohn had asked him to do some briefing in connection with this matter?

"A. No, sir, he did not.

"Q. Did you later find out that that was the case?

"A. No, sir.

"Q. Did he tell you subsequently that he was briefing a legal point in connection with this matter at the request of Mr. Roy Cohn?

"A. No, sir.

(*continued on following page*)

35) At this point, three annual installments allegedly due under the contract were unpaid. After Kramer said "yes" to becoming assignee of the contract, Banner proceeded to work out the assignment. (App. 37-38) Somewhere in the process, Banner, who had been previously acting for Panama, became Kramer's attorney in connection with the assignment and the collection of the claim against Caribbean, and has remained so throughout these proceedings, including the proceedings in this Court. (App. 46) A retainer agreement was entered into, two weeks after the Assignment, between Kramer and Banner's law firm; it provided for the maximum attorneys' fee permitted under the secret Side Agreement negotiated between Banner and Panama. Banner's firm reserved the exclusive right to determine whether an appeal should be taken from an unfavorable judgment. As contemplated by the Side Agreement, the retainer was on a contingent-fee basis. (App. 18-19)

Notwithstanding that the Assignment under Texas law (presumably despite the Side Agreement) would have per-

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"Q. Or of the law firm that Mr. Cohn is connected with?
"A. No, sir.
"Q. Did he tell you that it might be possible for someone to acquire this claim and make some money on it?
"A. Yes, sir.

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"Q. But he did tell you he was briefing a legal point involving a cause of action for a claim on which if prosecuted or enforced might result in profit for anybody that prosecuted it, isn't that right?
"A. That may be right. I am not saying that it isn't. He told me that he was briefing—at that time on this point—I'm not sure what he was doing. He told me he was doing some briefing, and as I recall he mentioned at some time or other that he was doing some briefing.
"Q. Did you later learn that this claim Mr. Banner was talking about was a claim under this contract between Panama-Venezuela Finance Company, Roy Kelly, and Caribbean Mills, Inc.?
"A. I think that's right." (App. 34-36)

mitted Kramer (under his theory of the case[5]) to institute an action against Caribbean in a Texas state court, Banner proceeded to file suit in Kramer's name in the United States District Court for the Northern District of Texas, Wichita Falls Division. This was done only six weeks after the date of the Assignment. (App. 1) The complaint pleaded the assignment of Panama's claim to Kramer but made no reference whatsoever to the secret Side Agreement. (App. 2-5) Jurisdiction was predicated solely on alleged diversity of citizenship, the assignee, Kramer, being a citizen of Texas and Caribbean an alien corporation.[6] (App. 2, 3) It is common ground between the parties in

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[5] It was the respondent's position that the assignment of the claim by Panama to Kramer was ineffective because the rights, if any, which Panama sought to assign were, in turn, dependent on an assignment to it from Kelly (see n. 1, p. 2, *supra*), and Kelly had never validly made such an assignment to Panama. See Brief for Appellant (the present Respondent), Court of Appeals, pp. 12-13, 18-26. We will henceforth, however, discuss the jurisdictional issue in the case on the hypothesis that the assignment from Panama to Kramer was valid under state law, although, for the reasons stated—having to do with Panama's own title—this is disputed. Because of its conclusion on the jurisdictional issues, the Court of Appeals did not reach the other grounds for reversal of the District Court's judgment, including the one just referred to, which were urged by the respondent before it, and should this Court not agree with us with respect to the issues tendered to it, these other issues would remain to be resolved on remand to the Court of Appeals.

[6] Section 1332(a) of the Judicial Code in pertinent part reads as follows: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

Jurisdiction was therefore predicated upon Clause (2) of the statute, which is sometimes referred to as the "alienage" provision.

this Court that there would be no diversity of citizenship jurisdiction between two aliens—even of different nationality—such as Panama and Caribbean.[7]— The respondent promptly raised the defense of lack of jurisdiction over the subject matter. (App. 6, 10)

Prior to trial, Kramer's deposition was taken with respect to the manner in which he came to be the plaintiff in the action. On Banner's advice, Kramer refused to answer questions with respect to the existence of agreements between him and Panama apart from the face of the Assignment. (App. 20-22) After an order of court was obtained requiring an answer, the existence of the secret Side Agreement first became known to the court and Caribbean.

The District Court denied respondent's timely motion to dismiss the action for lack of jurisdiction. The motion was made on the basis that in fact the suit was between two alien corporations and the assignment to Kramer was "collusive and improper", falling squarely within the bar of Section 1359 of the Judicial Code. The only basis assigned by the court for the denial was that the Assignment was "good on its face." (App. 12)

The case then proceeded to trial at which a jury rendered a special verdict in answer to various interrogatories put to it.[8] On the basis of the jury answers to the special

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[7] It has long been settled that the Constitution's grant of jurisdiction to the Federal courts in controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects," Art. III, § 2, does not extend to suits between aliens. *Hodgson* v. *Bowerbank*, 5 Cranch 303 (U.S. 1809); *Kavourgias* v. *Nicholaou Co.*, 148 F.2d 96 (9th Cir. 1945).

[8] These interrogatories all related to the merits of the action. (App. 77-81) The trial court did not undertake to submit jurisdictional questions for determination by the jury, and such matters were expressly withheld from the jury's deliberations. (App. 33) One of the responses to the interrogatories, which, of course, was

issues the District Court entered judgment for Kramer on his assigned claims against Caribbean for $165,000. (App. 77-81)

The Court of Appeals for the Fifth Circuit, in a unanimous opinion by Judge Thornberry, reversed the judgment of the District Court, on the ground that the District Court was without subject matter jurisdiction by reason of Section 1359 of the Judicial Code. The Court of Appeals concluded that:

> "By assigning its interest under the contract and obtaining a reassignment of 95% of that interest on the same day, Panama obviously intended to designate Kramer as a collection agent with the capacity to sue in federal court. To construe these transactions in another way would require serious departure from any traditional notion of reality. The question presented, then, is whether under Section 1359 an assignee for collection purposes can properly invoke federal jurisdiction. *In our view, he cannot do so because the assignment to him was made for the purpose of creating federal jurisdiction without divesting the assignor of his interest in the lawsuit.*" (App. 85) (emphasis supplied)

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necessary in order to establish that the claim was Kramer's, obviously an element of his substantive case, was to issue (2), answered to the effect that Panama assigned its interest in the contract in question to Kramer. (App. 78) Petitioner seizes on this as somehow probative of the issues as to jurisdiction. (Brief, pp. 40, 51-52) But obviously the finding relates only to Kramer's legal title to the claim, an element of his substantive case which he would have had to have proved even in state court. See *Smith v. Kernochen*, 7 How. 198 (U.S. 1849) ("The question . . . is one of proper parties to give jurisdiction to the Federal courts; not of title in the plaintiff. That would be a question on the merits . . ." 7 How., at 216).

The Court of Appeals noted that:

> "On oral argument before this Court, counsel for appellee [Kramer] made no particular effort to deny that Mr. Kramer is simply an assignee for the purposes of collecting Panama's claim in federal court."[9] (App. 84)

This Court granted certiorari.[10]

SUMMARY OF ARGUMENT

I. 1. The device used to create Federal jurisdiction in this case is in no way distinguishable from devices which have been condemned over the years as falling within the bar of predecessor statutes equivalent in all material respects to Section 1359. These cases, decided in the years following the passage of Section 5 of the Act of March 3, 1875, and which rely on statutory language with respect to "improperly or collusively" adding parties, have condemned transfers which have not divested the assignor of his entire interest in the subject matter of the claim, where the transfer is made with a motive of creating Federal jurisdiction.

2. To be sure, there is also a line of cases which holds that where a transfer is absolute and does not leave the assignor with any interest in the subject matter of the

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[9] Indeed, in this Court, the petitioner has conceded that the question presented is whether the Assignment (presumably when taken as a whole with the Side Agreement) falls within the bar of Section 1359 where "the motive for the assignment is to gain access to the federal court by creating diversity of citizenship." Petition for Certiorari, p. 2.

[10] For the termination of the asserted conflict of circuits on the basis of which certiorari was sought, see note 13, p. 42, *infra*.

claim, the motive for making the transfer is irrelevant. The point is that the assignment here is not on that side of the line. Here the assignor retained 95 percent of the beneficial ownership in the claim and Kramer simply had technical legal title plus a 5 percent commission or percentage interest; moreover, control over the litigation remained vested in the attorney who had originally represented Panama and had arranged the assignment.

3. If a device such as that employed here were sanctioned, there is no reason why it could not and would not be used in every case where a claim capable of transfer under state law was involved and where it was desired to create Federal jurisdiction. —Petitioner points to no policy reason why such a result should be sanctioned, and all considerations of policy militate against it.

II. In order to avoid the effect of the long line of cases in this Court that hold that an assignment made for the purpose of creating Federal jurisdiction is within the statutory bar if it does not divest the assignor of his entire interest in the claim, petitioner urges three grounds.

1. It is first claimed that the 1948 codification of the Judicial Code inadvertently altered the rule established by the cases which preceded it. This is clearly not the case. While the codification repealed the "Assignee Clause" of Section 11 of the 1789 Judiciary Act, the line of authorities in question was not decided under that statute. Those cases were decided under Section 5 of the 1875 statute. While certain editorial changes were made in the text of that provision when it was carried forward into Section 1359 of the present Code, the reviser's note makes it plain that no change in substance was intended. Moreover, the operative language on the basis of which the line of cases them-

selves proceeded was retained and carried forward in the 1948 revision, with the purpose and result of not making any substantive change in the law.

2. Nor is it dispositive, as petitioner stresses, that the arrangements here might have been enforceable between the parties to them under state law and might have permitted Kramer to sue in his own name in a state court. To some extent, this argument is afflicted with the vice of the petitioner's other argument that the 1948 revision had the effect of changing the law developed under Section 5 of the 1875 statute. Moreover, such state law considerations have never been treated as controlling, and there is no reason why they should be; a Federal statute designed to establish a matter of jurisdictional policy for the Federal courts should not be subject to frustration by results which might be reached under state law based upon entirely different policy considerations.

3. Petitioner urges that the language of Section 1359 be construed more favorably toward devices to manufacture Federal jurisdiction where the underlying controversy is between aliens, as here, than in the perhaps more usual case where it is between citizens of the same state. —There is no basis whatsoever in the statutory text, or in any valid reason of policy, why this should be so.

ARGUMENT

I. THE DEVICE EMPLOYED TO CREATE FEDERAL JURISDICTION IN THIS CASE IS INDISTINGUISHABLE FROM DEVICES WHICH HAVE BEEN CONDEMNED OVER THE YEARS AS FALLING WITHIN THE BAR OF PREDECESSOR STATUTES EQUIVALENT IN ALL MATERIAL RESPECTS TO SECTION 1359 OF THE JUDICIAL CODE

The essential issue in this case is whether Section 1359 bars the use of the device of an assignment, admittedly formulated with the motive of creating Federal jurisdiction, which (a) is entered into after a controversy arises, and (b) vests legal title to a claim in the assignee but leaves the assignor with the principal beneficial interest in the recovery to be had under the claim; in effect giving the assignee only a small percentage or collector's commission interest in the claim.

There is no issue before this Court that under the laws of Texas—and indeed under the law in most states, Texas hardly being unique in this respect—an assignment in the form of the Assignment here would be enforceable as between the parties to it and that an assignee like Kramer could have brought suit on the claim in his own name in a state court.[1] Indeed, putting to one side the substantive questions, it is not questioned that an assignee like Kramer could have sued on the claim in a Federal court if he and his assignor were each parties who could have maintained an action against the defendant in that court. Similarly, although petitioners do not stress it, there is no controversy but that the Side Agreement is also enforceable under state law and operates effectively to do what it purports to do—that is, to vest a 95 per-

[1] For the substantive questions touching the assignment which are reserved, see note 5, p. 6, *supra*.

cent beneficial interest in the claim in Panama. Nor, we might add, should there be any serious controversy as to the net effect of the overall arrangement: when the two pieces of paper are read together—despite what was obviously the original desire of petitioner that they not be read together—their net effect is to vest, for the purposes of creating Federal jurisdiction, the legal title to, but only a minor beneficial interest in, a disputed claim in Kramer, and to leave 95 percent of the beneficial ownership of that claim in Panama.

1. Schemes and devices like the one unearthed in the case at bar are hardly novel. Litigants have tried for years to use them to bring cases into Federal court which otherwise could not be brought there. The elements of these schemes are in a real sense classic; they are generally very similar to one another and underscore the admonition of Ecclesiastes that there is nothing new under the sun.[2] They characteristically involve the vesting of an assignee with legal title to a disputed claim while the assignor retains either the total or the principal beneficial interest in it. Often, as here, the reservation or grant-back of the beneficial ownership of the claim is set forth in a collateral agreement which the parties to some extent may hope will stay secret.

Schemes of this sort have been uniformly condemned by the decisions of this Court under statutory language identical in all relevant respects to Section 1359 of the Judicial Code. That language was introduced into the statutes in 1875 and commanded the dismissal or remand of an original or removed action when parties had been "improperly or collusively made or joined, either as plaintiffs or de-

[2] Chapter I, verse 9.

fendants, for the purpose of creating a case cognizable or removable" in or to the Federal courts.[3]

It is instructive to review the cases as an illustration of the consistency of the decisions of this Court in striking down schemes similar to the one here.

In *Williams* v. *Nottawa*, 104 U.S. 209 (1881), Kline and Connor, residents of Michigan, transferred defaulted bonds of a Michigan municipality to Williams, who was a citizen of another state. While the transfer was apparently absolute in form, when Williams was examined at trial he admitted that the beneficial ownership had been retained by the transferors. The Court found this a "collusive transfer" within the meaning of the language of the 1875 statute and ordered the suit dismissed. 104 U.S., at 211.[4]

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[3] The statute in question was Section 5 of the Act of March 3, 1875, c. 137, 18 Stat. 472, which read as follows:

> "That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just. . . ."

With minor changes, not here material, the provision appeared as Section 37 of the Judicial Code of 1911 and as Section 80 of the original Title 28 of the United States Code.

[4] There was, of course, no "collusion" in *Williams* in the narrow sense in which petitioner (Brief, pp. 47-48) suggests that this statutory phrase be read: namely, collusion between the plaintiff and the defendant. There was no suggestion in the record that the municipality was a party to the scheme, and indeed it vigorously contested the jurisdiction of the federal courts. This, in fact, was so in all the cases we will discuss at pp. 14-18.

In *Farmington* v. *Pillsbury*, 114 U.S. 138 (1885), another scheme bearing a striking similarity to the present one was involved. Here the assignors cut certain coupons from a bearer bond and delivered them to the assignee; the rule with respect to such instruments being, of course, that title to the bond or its coupons passes by delivery. The assignee, like Kramer here, paid a nominal consideration to the assignor; a note for less than 10 percent of the amount of the coupons.[5] A written collateral agreement, reminiscent of the Side Agreement here, was also entered into at the same time and is quoted at 114 U.S., at 140. It was agreed that Pillsbury, the assignee, would remit 50 percent of the net collection on the coupons to Dyer, the assignor.

The Court discussed the 1875 statute in detail. It pointed out that the inclusion of the language with respect to the discovery of a jurisdictional fault "at any time after such suit has been brought or removed thereto [*i.e.*, to the Federal court]" was meant to change the old procedural rule that the objection of lack of diversity of citizenship had to be raised by motion before answer and was waived by filing an answer. See 114 U.S., at 142-43.

The Court indicated that the substantive test applicable to the case before it was whether the assignment "actually conveys *all the interest* of the assignor in the thing assigned." 114 U.S., at 144 (emphasis supplied). Otherwise,

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[5] One might observe that the assignee in *Farmington* was more generous than Kramer was here. At least the assignee in *Farmington* gave a note for $500 for $7,922 worth of coupons. Here Kramer simply gave $1.00 for a claim of approximately $165,000. On the other hand, under the commission arrangements, the assignee in *Farmington* was permitted to keep 50 percent of the net collection whereas Kramer was only permitted to keep 5 percent.

as the court explained, there would be a case of a "collusive transfer" or "collusive assignment." 114 U.S., at 144-45.

As to the scheme in question, so similar to the one in the case at bar, the Court concluded that: "The suit is their own [the assignors'] in reality, though they have agreed that the plaintiff may retain one-half of what he collects for the use of his name and his trouble in collecting." 114 U.S., at 146. The Court, of course, concluded that: "We are clearly of opinion that this case falls within the prohibitions of the statute." 114 U.S., at 145.

The next decision of this Court also involves facts similar to those at bar. In *Little* v. *Giles*, 118 U.S. 596 (1886), an absolute deed to certain property was given by one Wheeler and one Burr to Giles, who was of diverse citizenship with the prospective defendant in the matter. As here, however, the parties had a collateral agreement under which after the expenses of litigation and the discharge of a mortgage on the property, Giles would remit back to Wheeler and Burr the value of one-third of the lands recovered in the suit. 118 U.S., at 605. Like Kramer, Giles was a stranger to the matter who was unfamiliar with the underlying events which had led to the controversy. Here again, the case was found to involve a "collusive transfer" and the suit was held outside of the Federal jurisdiction. 118 U.S., at 604.

Similar principles have been applied in corporate transfers where the assignor retained an interest in the subject matter of the suit. In *Lehigh Mining & Manufacturing Co.* v. *Kelly*, 160 U.S. 327 (1895), after a dispute over certain land had arisen between a Virginia corporation and certain individual Virginians, the Virginia corporation conveyed the land to a Pennsylvania corporation which was under common control with the assignor. There was no

issue as to the conveyance's being a valid instrument under local law, conveying the legal title. 160 U.S., at 339. But since the assignment was made for the purpose of creating Federal jurisdiction, and since the land could be reconveyed, or the proceeds of the suit retransferred, without consideration by the Pennsylvania corporation at any time to the Virginia corporation, the control and ownership of the corporations being the same, the Court concluded that the effect of the arrangements was that the beneficial ownership was in the Virginia corporation, found that the action was "collusive" within the meaning of the Act and held that Federal jurisdiction did not exist. 160 U.S., at 342-43.

A similar result was reached in *Miller & Lux, Inc.* v. *East Side Canal & Irrigation Co.*, 211 U.S. 293 (1908). There a dispute had arisen between two California corporations. One of them incorporated a subsidiary under the laws of Nevada and conveyed the property with respect to which the controversy had arisen to that subsidiary. Notwithstanding that the property was validly transferred in consideration for the issuance of the subsidiary's stock to the parent (211 U.S., at 303) the Court found that the case came within the predecessor of Section 1359 and that there was no Federal jurisdiction.[6]

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[6] The Court, conscious of the distinctions which had been recognized in the cases (see pp. 18-21, *infra*), observed that if at the time of the institution of the suit, "the California corporation had distributed among those entitled to it the stock of the Nevada corporation . . . and had then ceased to exist or been dissolved, a different question might have been presented. But such is not this case." 211 U.S., at 304. The Court pointed out that as long as the assignor remained in existence, without any new consideration it could have compelled at any time the Nevada corporation to transfer back the property which it had conveyed to it. 211 U.S., at 304.

The Court also pointed out that: "We do not intend by what has been said to qualify the general rule, long established, that the

A similar result was also reached in *Southern Realty Investment Co.* v. *Walker*, 211 U. S. 603 (1909), where certain Georgia attorneys maintained a South Dakota corporation which took title to claims for the purpose of suing on them against Georgia citizens in the Federal courts. While presumably the South Dakota corporation and the attorneys who organized it received some sort of commission for their efforts in collecting claims transferred to it, before remitting the proceeds to the assignors, the Court summarily held the device to be within the bar of the statute.

The lesson taught by all these cases is plain: Where a transfer is made with the motive of creating diversity of citizenship jurisdiction, and that transfer leaves the assignor with an interest, in whole or in part, by whatever means, in the subject matter of the assigned claim, the case is one of an "improper or collusive" transfer and the statutory bar—currently contained in Section 1359 of the Judicial Code—to Federal court jurisdiction is applicable.[7]

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jurisdiction of a Circuit Court, when based on diverse citizenship, cannot be questioned upon the ground *merely* that a party's motive in acquiring citizenship in the State in which he sues was to invoke the jurisdiction of a Federal court." 211 U.S., at 304 (emphasis original). See p. 19 and n. 8, *infra*.

[7] A Court of Appeals case, *Central Paper Co.* v. *Southwick*, 56 F.2d 593 (6th Cir. 1932) applies the line of cases from this Court to a fact situation once again reminiscent of the facts here. There an assignment was made to one Southwick, who paid only $1 for it, and "was to pay more only if he collected the money." 56 F.2d, at 596. It also appears that Southwick was to "deduct something for his services for making the collection." 56 F.2d, at 597. The Court of Appeals, applying the line of cases in this Court, and acknowledging that Southwick had been vested with "technical legal title to these claims", nonetheless held the scheme in question to be within the bar of the Act of 1875. 56 F.2d, at 596-97.

2. A line of authority also has developed in this Court over the years to the effect that where a transfer of a claim is in fact absolute, and the assignor retains no interest in the subject matter of the claim, the transfer is not a collusive one under the statute and the motive of the transfer is not relevant. It is, of course, on these cases, which are entirely different from the case at bar, that the petitioner relies so heavily. (See Brief, pp. 28-34).[8]

Thus, in *Cross* v. *Allen*, 141 U.S. 528 (1891), it was held that where there was an absolute transfer of title, "the pecuniary interest of the transferrer [sic] in the subject matter of the transfer having thereby terminated, it makes no difference that by such transaction the transferree [sic] acquired the advantage of suing in the Federal court." 141 U.S., at 533. Thus, if the parties here had been willing to make the transfer on a basis which in fact divested the transferor of its interest in the claim—such as by Panama's making a bona fide sale of it to Kramer for a lump sum, not on a basis which reserved 95 percent of the net recovery to the transferor—the motive of making the transfer would have been irrelevant.

This rule was applied in *South Dakota* v. *North Carolina*, 192 U.S. 286 (1904). There the considerations were not simply those of the diversity jurisdiction but of the

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[8] Petitioner accordingly follows the tack of arguing that the issue in this case is whether the motive of an assignment is *always* controlling, citing cases *in this category* to the effect that it is not. This false issue is repeatedly asserted and, naturally, won, throughout petitioner's brief. Thus, petitioner states (Brief, p. 28) that: "It has often been fashionable to assume that all efforts to create or manufacture Federal diversity jurisdiction are or should be condemned *per se*." And that: "a motive to create or manufacture diversity does not per se oust a federal court of jurisdiction." (*Ibid.*) As the cases we discuss here teach, this is so, but it is irrelevant. Similar assertions of the false issue as to whether motive is disqualifying *per se* appear in Petitioner's Brief at pages 29, 31, 32, 33 and 44.

Eleventh Amendment, the subject matter of the transfer being defaulted North Carolina State bonds. Certain bondholders made an absolute gift of the bonds to the state of South Dakota which proceeded to sue on them in an original suit in this Court. There was no suggestion whatsoever that the transferors retained any interest in the donated bonds. The Court upheld the jurisdiction in a five-to-four decision.[9]

Similarly, in *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928), the Court held that where a Kentucky corporation, having a dispute with another Kentucky corporation, transferred its assets to a Tennessee corporation and then dissolved, thereby

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[9] The Court observed that the transferors held *other* defaulted North Carolina bonds and "probably the donor made the gift under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might inure to his benefit as the owner of other like bonds." 192 U.S., at 310. Just how it would is somewhat obscure, inasmuch as there still would have been no forum in which a suit could be maintained on the bonds by the individuals against the state of North Carolina. Indeed, the letter of transmittal giving the bonds to the State recited:

> "The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate.
>
> "These bonds can be used to great advantage by States or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.
>
> "If your State should succeed in collecting these bonds, it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating state, rather than accept the small pittance offered in settlement.
>
> "The donors of these ten bonds would be pleased if the legislature of South Dakota should apply the proceeds of these bonds to the State University or to some of its asylums or other charities.", 192 U.S., at 289-90.

In any event, the transfer of the donated bonds was absolute.

terminating the existence of the transferor Kentucky corporation, the "motives which induced" the transfer were irrelevant. 276 U.S., at 524. This was the case which had been left open in *Miller & Lux, Inc.* v. *East Side Canal & Irrigation Co., supra,* 211 U.S., at 304, see n. 6, p. 17, *supra,* and the Court accordingly observed that "it requires no discussion to distinguish" the *Miller & Lux* case. 276 U.S., at 525.

This line of cases is similar to the authorities which teach that where a natural person makes an actual transfer of his domicile to another state "with the intention of making [his] home in that state for an indefinite time" the fact that the purpose of the move was to create diversity jurisdiction is immaterial. *Williamson* v. *Osenton,* 232 U.S. 619, 623 (1914).[10]

In all these cases where the motive of a transfer has been found irrelevant, there is an obvious unifying feature. That feature is that the transferor has been divested entirely of any interest in the claim in question. Obviously, such a divestment is a fact of independent significance and provides a convenient and practical line which can be used for determining the jurisdiction of the Federal courts. In the cases where motive has been found irrelevant and the jurisdiction upheld, there have been factors such as the unqualified acquisition of the entire claim by the assignee on a basis which terminates the assignor's interest; the assignor's death;[11] a change in personal domi-

[10] Of course, where the change in domicile is feigned, the Federal courts are without jurisdiction. *Morris* v. *Gilmer,* 129 U.S. 315 (1889).

[11] Thus, for many years it was held that a Federal court would not go behind the order of a state court naming a decedent's administrator to inquire as to why an administrator of his citizenship was appointed. *Mecom* v. *Fitzsimmons Drilling Co.,* 284 U.S.

cile or, coupled with dissolution of the transferor corporation, in corporate domicile.

Requiring a fact of independent significance such as these limits the avenues for creating Federal jurisdiction as a practical matter. Here, obviously, the parties were unwilling that Kramer acquire the claim from Panama on a basis under which he would pay, and the transferor would receive, a lump sum valuation of the strength and

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183 (1931). In such a situation, where diversity is created by the appointment, there is no question but that the assignor—the decedent—is ousted by death of all interest in the claim and accordingly the courts have applied the rubric that under these circumstances the motive of the assignment—the choice of citizenship of the administrator—is not to be examined. The jurisdiction was accordingly upheld in a number of courts of appeals even where a purpose of the appointment of a particular administrator was to give him the right to sue in Federal court. See *Corabi* v. *Auto Racing, Inc.*, 264 F.2d 784 (3d Cir. 1959); *County of Todd* v. *Loegering*, 297 F.2d 470 (8th Cir. 1961); *Lang* v. *Elm City Construction Co.*, 324 F.2d 235 (2d Cir. 1963). To some extent, these cases also rely on an unwillingness to take a step smacking of collateral attack on a state court appointment.

Recently, under the weight of an increasing number of appointments of out-of-state administrators for decedents' estates with a motive to create Federal jurisdiction, the Third Circuit overruled its previous ruling in *Corabi*. See *McSparran* v. *Weist*, No. 16,793, 3d Cir., October 2, 1968, certiorari pending, No. 772, O. T., 1968. Whether the Third Circuit was correct in *Corabi*, or in *McSparran* in dealing with the problem of an apparently enormous influx of cases into the Federal courts, does not directly affect the issues involved in this case.

A result contrary to *Corabi* can be justified by holding that while the transfer of the claims to the estate of the decedent by his death is, of course, an absolute transfer and one of independent significance, substitutions of administrators or appointments of special administrators to prosecute individual actions—involved in *Corabi* and a frequent feature of these cases—are equivalent to transfers without any real divestment of economic interest, of the sort condemned by the line of cases described at pages 14-18, *supra*.

McSparran, although it expressly overruled *Corabi* (see slip opinion, p. 16), was itself a case involving the appointment of a guardian for a child. The cases involving such guardians are apparently in complete conflict due in part to the complicating fac-

market value of the claim, which would have left Panama without further interest in the outcome of the claim. If the parties were willing to go that far in dealing with claims, so that their transfer constituted a transaction having economic reality, it might make practical sense to treat motives as irrelevant. Similarly, the steps of dissolution of a corporation and reincorporation in another state, or of personal change of domicile, afford a substantial independent check on access to the Federal courts. Indeed, the line of cases in the courts of appeals to the effect that the citizenship of an administrator or executor, notwithstanding the motives of his appointment, is controlling for jurisdictional purposes regardless of the citizenship of the decedent, can be viewed as *a fortiori* cases from these principles.[12] Certainly it can be said that a person's death terminates his interest in his claims in as absolute a fashion as could be imagined. One would hardly think that access to the Federal courts would be worth such a cost to many litigants.[13]

The assignment involved here is completely different from those involved in the cases in which this Court has refused to look to the motives surrounding assignments.

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tors inherent in the relationship. See generally Wright, *Federal Courts* (1963), p. 82. Since the child generally cannot sue in his own name, but must sue through a representative, there would appear to be an argument available under the decided cases that the representative's citizenship should govern. On the other hand, where the suit might be maintained by a general guardian such as a parent, but a guardian *ad litem* is appointed of diverse citizenship, it can be contended that the citizenship of the special guardian is not controlling. See Wright, *Federal Courts* (1963), p. 82. *McSparran* involved the appointment of a special guardian.

[12] See n. 11, pp. 21-23, *supra*.

[13] As indicated above, cases involving substitute administrators, or the appointment of special guardians where general guardians exist, may pose separate problems. See n. 11, pp. 21-23, *supra*.

Here, the alien assignor retained 95 percent of the beneficial ownership in the claim, and Kramer simply had technical legal title plus a 5 percent commission or percentage interest. Moreover, although it is probably superfluous, control over the litigation remained vested in Banner, the attorney who had originally represented Panama. See pages 4-5, *supra*.

It is, of course, not without interest that the petitioner here originally attempted to bring this case within the line of cases holding that where the transferor's interest in an assigned claim had terminated, the motives for the transfer are not assailable.[14] Only the Assignment was pleaded in the complaint. The existence of the secret Side Agreement, which revealed that the assignor retained a 95 percent beneficial interest in the recovery, was not disclosed to the court or the respondent, and became known only after plaintiff was compelled by a court order to make it known. It was only after all the facts became known that the petitioner was forced to adopt the extraordinary legal theory set forth in his brief in this Court.

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[14] A case which comes close to the dividing line of the cases, but which was decided on other grounds is *Bullard* v. *City of Cisco*, 290 U.S. 179 (1933). There, a Bondholders' Protective Committee was permitted to invoke the jurisdiction of the Federal courts even though the individual depositors of the bonds in some cases had holdings of less than the jurisdictional amount. Although the depositors were of diverse citizenship from the defendant, see 290 U.S., at 181, the Court in a dictum apparently indicated that the citizenship of the committee members, rather than the depositors, would govern. See 290 U.S., at 190. The decision stresses the familiarity of the Protective Committee device, which was then—in the depths of the depression—a common one. See 290 U.S., at 181. The Court also stressed the broad range of powers invested in the committee "for the purpose of conserving, salvaging and adjusting the investment" in the insolvent issuer. 290 U.S., at 189. The Court observed that: "We think it apparent from the [depositary] agreement as a whole that resort to litigation was not

3. The scheme involved here, if approved by this Court, would bring about the availability of an almost universal "instant diversity" jurisdiction. This is in contrast to the line of authorities we have reviewed in part 2 above—where the courts have declined to look to motive only where the transferor has been completely divested of interest in the assigned claim—such as by death, by absolute transfer for a lump sum consideration or by gift without "grant back" or reservation of an interest in the claim, or by legitimate corporate succession coupled with dissolution of the transferor.

If diversity of citizenship can be created in this case through the device chosen, it can be created in any contract case involving the statutory jurisdictional amount, or, indeed, in noncontract cases wherever state law permits the assignment of noncontract claims.[15] There is

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the principal thing in mind when it was being made." 290 U.S., at 190.

The motive of the arrangement in *Bullard* was clearly not to create Federal jurisdiction, inasmuch as all the depositors were of diverse citizenship and apparently most had claims in excess of the jurisdictional amount. The case is thus similar to that of a stockholders' derivative suit or a class action, where the citizenship of the particular stockholder or class member who brings suit is determinative, even where other stockholders or members are of common citizenship with the defendant. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921). Focusing on the citizenship of the Protective Committee members, the stockholder, or the class representative does not open the Federal courts to suits which would not otherwise be there; it simply permits the more complete adjudication of a claim which could be entertained in any event in Federal court at the individual suit of a bondholder, stockholder or class member of appropriate citizenship. On the other hand, jurisdictionally honoring an assignment of a claim on a "five percenter" basis, such as here, would vest the Federal courts with jurisdiction of matters they would not otherwise have.

[15] See, e.g., *Smith* v. *State Farm Mutual Automobile Ins. Co.*, 278 F. Supp. 405 (E.D. Tenn. 1967) (*ex delicto* actions for injury to property are assignable under Tennessee law); *Kerigan*

nothing peculiar or unique about the Texas law in this respect and we may assume that under the law generally in this country, the Assignment and the Side Agreement would both be enforceable in accordance with their terms, certainly with respect to claims arising under contract.[16] Thus, should the Court depart from the settled line of precedents set forth at pages 14-18 above, diversity of citizenship could be created in any contract case by finding an out-of-state assignee—of which there would be no shortage[17]—to execute the assignment and grant-back papers, reserving a modest commission.[18] Of course, for the

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v. *Massachusetts Bonding & Ins. Co.*, 74 F. Supp. 820 (W.D. Mo. 1947) (action for fraud and deceit is assignable under Missouri law).

[16] Today "[n]early everywhere, statutes have formally declared contract rights and other 'choses in action' to be assignable, so that in an ordinary civil action the assignee can (and generally must) maintain suit in his own name." 4 Corbin, *Contracts* (1951), § 856, at p. 408. See also Restatement 2d, *Contracts* (Tent. Draft No. 3, 1967), pp. 141-62. As Petitioner recognizes, see Brief, pp. 36-37, Texas law is not unique in holding that lack of consideration for a completed assignment is immaterial. See *Globe Indemnity Co.* v. *Puget Sound Co.*, 149 F.2d 805 (2d Cir. 1945). Nor is Texas law unique, assuming it permits an assignee to maintain suit even though he must account for the proceeds of the suit to his assignor. See *Titus* v. *Wallick*, 306 U.S. 282, 289 (1939) (under New York law assignment is valid "even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor"; judgment obtained by assignee must be accorded "full faith and credit").

[17] The availability of the device might afford opportunities for friendly cooperation among members of the bar. In one case, one could serve as attorney and the other as assignee, and in the next case the roles could be reversed. As Kramer said here, during a lapse into candor, if he had acted as attorney on the claim, "I would have had the 33⅓% and Mr. Banner would have had the 5%." (App. 52)

[18] The record indicates here that there were negotiations as to whether Kramer's commission would be 5% or 10%. (App. 46) If the device used here is sanctioned, undoubtedly in subsequent

reasons which we shall develop at pages 37-39, *infra*, the restriction of the doctrine belatedly contended for in this case to "alienage" situations—which was not suggested in the Petition for Certiorari and is even absent from the "Questions Presented" in the petitioner's brief on the merits—will not hold water.

If this Court sanctions the device used here, one may confidently expect that the text of the Assignment and of the Side Agreement here involved would be printed in form books on Federal procedure so that they would be easily available to everyone. They would become of universal application. Publishers publishing the Federal Rules of Civil Procedure would undoubtedly find it a service to the Bar to reproduce the forms as a special appendix. While the unearthing of the Side Agreement in this case may have been somewhat painful to Kramer, once the device at bar were sanctioned by the Court the need for any secrecy in its use would vanish and subsequent plaintiffs could make open reference to it and openly quote it in their complaints. As these forms' use became more standardized, in the interest of the shortened form of pleading contemplated by the Federal Rules of Civil Procedure, it might be acceptable simply to plead that the assignor and the plaintiff had executed an Assignment and a Side Agreement in the common form.

We trust that the foregoing discussion will not seem unduly apocalyptic. There is no reason why, if the device at bar here is not within Section 1359, it could not be utilized in any case where the claim in question was assignable

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cases the commission level would be reduced and very likely the negotiations would simply be as to whether the commission would be 1% or 2%. After all, one would anticipate that pioneers like Kramer would be entitled to a greater reward than those who would simply follow in their footsteps.

as a matter of state law and where the jurisdictional amount was present.[19]—Petitioner has notably failed to point to any reason in policy why the Court should reach such a result. All the policy reasons look the other way.[20] Once

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[19] Thus, after the *Corabi* decision in the Third Circuit, a study by the ALI of the diversity actions brought in the Eastern District of Pennsylvania indicated that approximately 20% of the actions were instituted by out-of-state fiduciaries. ALI Study of the Division of Jurisdiction Between State and Federal Courts, Proposed Final Draft No. 2 (April 30, 1964), Commentary, p. 63, § 1301. The plain fact is that where a device such as that sanctioned in the *Corabi* case or contended for by petitioner here is sanctioned and available, it will be vigorously used. Thus, in the 1950's the Philadelphia Orphans Court, after a study of relative verdicts in the Pennsylvania Common Pleas Courts and in the Federal Court for the Eastern District of Pennsylvania, determined that since larger verdicts were expectable in Federal Court, in the interests of the children which were its wards it would thereafter overcome its previous reluctance to appoint an out-of-state fiduciary and do so upon request. *McSparran* v. *Weist*, 3d Cir., No. 16,793, October 2, 1968, slip opinion, p. 7. Once the assignment device used here were sanctioned, no doubt a similar duty to act in the best interests of his client through the consideration of the use of the device would be incumbent upon all attorneys representing prospective plaintiffs in cases where no diversity existed between the real parties in interest.

We do not mean to suggest that the devices involved in the *Corabi* case and here must stand or fall together. As we have developed, the historic line drawn by the decisions of this Court could well be said to lie between the practice permitted by *Corabi* and the device here. To be sure, the experience under the *Corabi* rule, which led to its overruling in the *McSparran* case, might well lead the Court to conclude that the line should be drawn so as to include additional schemes within the bar of Section 1359. But certainly there is no reason in policy why devices which were previously barred should now be permitted.

[20] There are a number of reasons that are advanced for the diversity jurisdiction: that it removes or lessens the danger of local prejudice against out-of-state litigants and thereby fosters the national mobility of capital, investment and population; that it is necessary to implement the Constitutional guarantee that "the citizens of each State shall be entitled to all the privileges and immunities of the several States," Art. IV, § 2; and that Federal courts are allegedly superior to State courts. See Wright, *Federal Courts* (1963), § 23. It is significant that none of these reasons suggest that an assignee such as petitioner should be able

the device was sanctioned, every lawyer representing a potential plaintiff in a dispute between citizens of the same state would, we submit, be duty bound to consider whether the advantages of bringing the case in Federal court would outweigh the modest percentage commission which would have to be retained by the assignee. There is nothing unique about the scheme here which would suggest that it could be limited to cases where the original parties were aliens or where their names were the same as the parties to this case.

II. NONE OF THE REASONS CITED BY PETITIONER FOR THE ALLEGED INAPPLICABILITY OF THE UNIFORM DECISIONS OF THIS COURT TO THIS CASE IS VALID

To avoid the result taught by the settled line of cases in this Court, to the effect that a transfer which does not divest the transferor of its entire interest in the claim must

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to manufacture diversity jurisdiction. As we point out at pp. 38-39, *infra*, it is unlikely that a State court would show bias in a suit involving two aliens; and it is ludicrous to suggest that an assignment is a necessary device to avoid prejudice in a suit between citizens of the same state. The argument in favor of diversity based upon the privileges and immunities clause is inapplicable by its terms to a suit involving two aliens or two citizens of the forum State—the type of suit in which assignments have been most frequently used in efforts to create diversity. The justification based upon the alleged superiority of the Federal courts proves too much for, if accepted, it would support a finding of Federal jurisdiction in any suit in which it is presently lacking. It presents a matter for consideration by way of a constitutional amendment, not judicial action. Cf. *United Steelworkers* v. *Bouligny, Inc.*, 382 U.S. 145 (1965).

Moreover, even those who are strongly in favor of *extending* diversity jurisdiction, see Moore & Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Texas L. Rev. 1 (1964), believe that the limited jurisdiction of the Federal courts requires "a prohibition against the manufacture of diversity jurisdiction . . . by a colorable assignment or otherwise." *Id.*, at 35. See also 3A Moore's *Federal Practice* (1968), ¶ 17.05 [3.-3].

be viewed as "improper or collusive" under the statute where motivated by a desire to create federal jurisdiction, petitioner urges three grounds:

(1) The effect of the 1948 codification of the Judicial Code;

(2) That the Assignment here (and presumably the Side Agreement) are valid under state law; and

(3) That the underlying claim here is not between two citizens of the same state but between two aliens.

None of these arguments for dispensing with the settled treatment of schemes similar to this in the long line of cases in this Court is valid.

1. *The Effect of the 1948 Codification.*—The petitioner urges that the 1948 codification of the Judicial Code changed the result of the cases which we cite at pages 14-18, *supra.* This is apparently claimed for two separate grounds:

(a) There is first a highly tentative suggestion by petitioner that the cases which condemn schemes like the one at bar were decided under the so-called "Assignee Clause" of the Judiciary Act of 1789, Section 11, 1 Stat. 79. (Brief, pp. 40-42) This clause forbade, with an increasing number of exceptions and in increasingly confused terms over the years, an assignee *of certain sorts of claims* to sue in Federal court—notwithstanding the absolute transfer of the assignor's rights to him or the bona fides of that transfer—unless his assignor could have sued.[1]

The fact that the "Assignee Clause" of the Act of 1789 was dropped completely in the 1948 revision is completely

[1] The Judiciary Act of 1789, c. 20, § 11, 1 Stat. 78, provided that:

"... [No] district or circuit court [shall] have cognizance of any suit to recover the contents of any promissory note or

immaterial. The fact of the matter is that none of the cases striking down schemes such as petitioner's which we have cited above (pp. 14-18) was decided under the Assignee Clause. They were all decided under Section 5 of the Act of 1875, which denied Federal jurisdiction where the parties to a suit "have been improperly or collusively made or joined . . . for the purpose of creating a case cognizable or removable" in or to Federal court. Immediately prior to the 1948 revision Section 5 of the 1875 Act was known as Section 80 of Title 28 of the U.S. Code. As the Reviser's Note points out, the approach in drafting Section 1359 was "substantially following said Section 80."[2]

(b) Petitioner lays more emphasis on the fact that in adapting Section 5 of the Act of 1875 (later Section 37 of the Judicial Code of 1911 and Section 80 of the original Title 28 of the U.S. Code) the 1948 codifiers omitted certain language. We have set forth the language of the prior statute, and of the present Section 1359, in the margin for ready comparison.[3]

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other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. . . ."

By the time of its final version as 28 U.S.C. § 41(1) (1946), the Clause provided that:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

[2] The Reviser's Note is set forth following 28 U.S.C. § 1359, at pp. 26-27 of the U.S.C.A. volume.

[3] In its last pre-1948 version, the provision in question (§ 37, 1911 Judicial Code, 36 Stat. 1098, 28 U.S.C. § 80), read as follows:

"If, in any suit commenced in a district court, or removed from a State court to a district court of the United

The language omitted in 1948 was the language to the effect: "if, in any suit commenced in a district court or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court . . . ." From this deletion, petitioner seeks to have this Court draw the inference that it is only where there is collusion between the ostensibly opposing sides of a lawsuit[4] that the bar of Section 1359 is applicable. (Brief, pp. 42-49)

States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

28 U.S.C. § 1359 presently provides that:

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

[4] It appears that the only court which has ever adopted the view that "collusively" as used in Section 1359 has the restricted meaning suggested by petitioner was the Court of Appeals for the Third Circuit in *Corabi* v. *Auto Racing, Inc.*, 264 F.2d 784 (1959). In *McSparran* v. *Weist*, No. 16,793, October 2, 1968, the Third Circuit overruled *Corabi* and expressly repudiated this narrow view of the meaning of "collusive" in the statute. See slip opinion, pp. 10-12. Indeed, even in *Corabi* the expression of views was a dictum, the court having already decided that the case of an appointment of an administrator fell within the line of cases holding that in a transfer which divests all interest of the assignor, the motive for the transfer is not relevant. See pp. 18-23, *supra*.

This argument is totally fallacious. In the first place, it was the express intention of the revisers in deleting the language in question that no substantive change in the law be made, inasmuch as the deleted language was unnecessary. The Reviser's Note says, simply enough, that the language was "omitted as unnecessary" since "any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion." [5]

Not only did the revisers think that dropping the language in question made no substantive difference, but the long line of cases decided under the provision turned not on the language that was deleted in 1948 but the language that was retained by the 1948 revisers—the language referring to "improperly or collusively" making or joining parties. While this language obviously included, among other things, collusion between the plaintiff and the de-

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[5] Petitioner repeatedly quotes (Brief, pp. 43, 45) a question from that prolific book of questions, Hart & Weschler, *The Federal Courts and the Federal System* (1953), p. 721: "Were the revisers well-advised in what they did?"

While we cannot pretend to know the answers to all the questions asked in Professors Hart & Weschler's book, it seems clear from the context (a discussion of "Challenging the Existence of Federal Jurisdiction in Regular Course of Trial and Appellate Review") that what the Professors were asking was whether the revisers might have inadvertently upset the rule that a Federal court will examine its own jurisdiction at any time, *sua sponte* if necessary. Evidently under certain of the early 19th century cases, decided prior to the 1875 Act, this was not the case. (See *Farmington* v. *Pillsbury, supra,* 114 U.S., at 142, discussed at pp. 15-16, *supra;* see also *Smith* v. *Kernochen,* 7 How. 198 (U.S. 1849), discussed in n. 8, pp. 36-37, *infra.*) The language deleted obviously is relevant to this issue as to the appropriate time for jurisdictional challenges. The question is not meant to suggest that in fact the revisers accidentally made a substantive change in those schemes which would be held ineffective to create Federal jurisdiction. See generally Hart & Weschler, *supra,* pp. 719-21.

Of course here, the respondent has at all stages of the proceeding, by Rule 12 motion and by answer, denied the jurisdiction of the Federal courts over this suit. There is no issue as to the timeliness of its challenge to the jurisdiction.

fendant (see *Detroit* v. *Dean*, 106 U.S. 537 (1882)), it was applied to all the schemes, similar to the one here, embraced in the cases we have discussed at pages 14-18, above, where there was no collusion between the two sides of the lawsuit and where in fact the defendants uniformly were staunchly denying the existence of jurisdiction.

Since the revisers did not intend to change the substantive law, and since they retained the operative language under which the former cases had been decided,[6] it would not appear permissible to do anything other than bring forward the distinction taught by the long line of cases decided under the 1875 Act, namely, that where an assignment leaves the assignor with a beneficial interest in a claim, and is made for the purpose of conferring Federal jurisdiction—as is the case here—it is within the bar of the statute. After all, the basic teaching concerning the interpretation of the 1948 revision is that: "Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such change is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227 (1957). To the same effect, see *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 532 n. 11 (1967); *Ex parte Collett*, 337 U.S. 55, 68-69 (1949).[7]

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[6] For the reliance on these decisions on the portion of the statutory language which was retained in Section 1359, see *Williams* v. *Nottawa*, *supra*, 104 U.S., at 211; *Farmington* v. *Pillsbury*, *supra*, 114 U.S., at 144-45; *Little* v. *Giles*, *supra*, 118 U.S., at 604; *Lehigh Mining & Manufacturing Co.* v. *Kelly*, *supra*, 160 U.S., at 339.

[7] See 3A Moore's *Federal Practice* (1968), ¶ 17.05 [3.-1], at p. 157 to the effect that Section 1359 carries forward the teachings developed under the 1875 statute. For Moore's part in the revision, see *State Farm Fire & Cas. Co.* v. *Tashire*, *supra*, 386 U.S.,

2. *The Question of Validity under State Law*—The petitioner also suggests that an almost controlling factor as to whether an assignment escapes the bar of Section 1359 is whether the assignment is valid under state law. (Brief, pp. 34-40, 49-51) We do not, of course, deny that an assignment invalid under state law should not be recognized in Federal court. Moreover, an assignment valid under state law, in a case otherwise within the diversity jurisdiction of a Federal court, under normal principles, would be honored as a matter of substantive law by the court. The question, rather, is whether state-law validity of an assignment is somehow determinative of this case; that is to say, whether if under state law the Assignment vested legal title to the claim in Kramer, and the Side Agreement created an obligation on Kramer to account for 95 percent of the net proceeds, and these arrangements were enforceable between the parties to them, and would have permitted Kramer to sue in his own name in a Texas state court, it somehow would mean that the Federal courts would be bound to uphold the device as a creator of diversity jurisdiction.

This suggestion is likewise without merit. To a considerable extent it appears to be predicated on the erroneous contention (which we discuss above, pp. 31-34) that the 1948 revision inadvertently changed the substantive law taught by the established cases in this Court. Succinctly stated, the petitioner's position is that: "In thus restructuring § 1359, the revisers can be said to have rendered somewhat impotent . . . the precedential value of certain pre-revision decisions of this Court . . . ." (Brief, p. 46) The petitioner's position is that the section is now limited to collusion between the

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at 532 n. 11. To the same effect is *Bradbury* v. *Dennis*, 310 F.2d 73, 74 (10th Cir. 1962), cert. denied, 372 U.S. 928 (1963).

two sides of the lawsuit or to devices which are "illegal or fraudulent in . . . inception or contrary to relevant state law." (Brief, p. 49) But this position is clearly wrong; as we have shown above, the 1948 revision did not change the substantive law established by this Court's decisions over the years under the 1875 statute.

To the extent that the petitioner's argument is not based on a contention that the 1948 revision changed the law, its focus on the question of fraud or illegality under state law is a concentration on a matter of complete irrelevance. The cases we have discussed (see pp. 14-18, *supra*) demonstrate that it is of no importance whether the assignments in question would have disqualified the assignee from suing in his own name in state court or whether the arrangements were enforceable between the parties.[8]

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[8] In only two of the cases is there any express discussion of the validity of the arrangements between the parties under state law, although in all the cases their validity under state law appears to be presumed. In *Little* v. *Giles*, *supra*, 118 U.S., at 602, the Court expressly held that although the deed of assignment was "binding between . . . [Giles] and his grantors," it still amounted to a collusive transfer within the meaning of the Act of March 3, 1875. In *Lehigh Mining & Manufacturing Co.* v. *Kelly*, *supra*, 160 U.S., at 336, 347, it was common ground between the majority and the dissenters that "technical legal title" was in the transferee who "could legally assert its title against the parties in possession in a state court." Nonetheless, the Court found the assignment "collusive" within the meaning of the statute. These cases—and the obvious approach of the other cases which we have discussed which treat the state law questions as irrelevant—refute the petitioner's suggestion (Brief, p. 49) that: "Compliance with state law becomes not only relevant but dispositive of the collusion issue [under Section 1359]."

Indeed, in a case decided before the passage of the 1875 Act, but decided under general principles of the diversity jurisdiction (not under the assignee clause), it had been settled that the question of diversity jurisdiction in the Federal courts did not turn on the validity of an assignment under state law or whether the assignee could sue in a state court. In *Smith* v. *Kernochen*, 7 How. 198 (U.S. 1849), the Court was presented with the contention that federal jurisdiction was lacking because the plaintiff below had been assigned the mortgage upon which suit was based for

The reasons are obvious. Whether an assignee may sue in his own name in a state court is a function solely of the state's policy with respect to the assignment of claims. Commercial practice has been the touchstone in the development of the law here. Jurisdictional considerations, even under state, let alone Federal law, have not been factors in the development of state law here. The state courts and state law certainly have no interest in, and no relevance to, the question of when the jurisdiction of the Federal courts should be protected against assignments which leave the assignor a substantial beneficial owner of a claim and are made for the purposes of creating Federal jurisdiction.[9]

3. *The Alleged Distinction Between Ordinary Diversity and Alienage Diversity.*—Although not made in the Petition for Certiorari, petitioner as an introductory argument in his brief (pp. 23-28) advances the fantastic contention that devices to create Federal jurisdiction, which would not pass muster where the underlying controversy was between citizens of the same state, should be treated more indul-

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the purpose of manufacturing diversity of citizenship. The Court noted that "[t]he suit would be free from objections in State courts," but nevertheless indicated that timely objection could have been made in federal court that "the transaction between the company [mortgagee] and the plaintiff [mortgagee's assignee] was fictitious and not real; and the suit still, in contemplation of law, [is] between the original parties to the mortgage. The question, therefore, is one of proper parties to give jurisdiction to the Federal courts; not of title in the plaintiff. That would be a question on the merits. . . ." 7 How., at 215-16.

[9] In a related argument, petitioner contends (Brief, pp. 51-52) that the "findings" of the trial judge and the jury somehow make this case different. As developed above, the jury did not pass on the jurisdictional issue (n. 8, pp. 7-8, *supra*) and its finding does not answer the proper question. The court's recital that the Assignment was "good on its face" (p. 7, *supra*) obviously is only the start, not the end, of the inquiry.

gently where the underlying controversy is between two aliens.

(a) In the first place, it must be pointed out that there is no basis whatsoever in the statutes for any such view. Neither the Constitutional, nor (with one brief exception)[10] the historic statutory definitions of the so-called "diversity" jurisdiction, ever has included *either* suits between citizens of the same state or suits between aliens (notwithstanding that the aliens are citizens of different foreign nations, as here). Section 1359 makes no distinction between devices to manufacture diversity citizenship where the dispute is really between citizens of the same state and where it is really between aliens. There is no reason in the Judicial Code whatsoever why this Court's construction of Section 1359 in this case would not be applicable, under the statutes, to cases where diversity jurisdiction is manufactured where the underlying controversy is between citizens of the same state.

(b) Not only is there no basis in the statutes for such a distinction, there is clearly no reason for laboring to try to perceive or, rather, to create one. It is completely mysterious why it is contended that the Federal courts should be opened to controversies between aliens where they would not be opened to suits between United States citizens who happen to live in the same state. There is no reason in policy for the Federal courts to strain a point to become a forum for the adjudication of disputes among foreigners. Necessity may have made this country to some extent the world's policeman, but it had not been, we suppose, suggested prior to this case that we should become the world's justiciary as well.

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[10] The 1789 Judiciary Act purported to vest jurisdiction in such cases, § 11, 1 Stat. 78. The provision was promptly declared unconstitutional in *Hodgson* v. *Bowerbank*, 5 Cranch 303 (U.S. 1809).

There is no reason in policy why suits between aliens not involving federal questions should not be left either to the courts of their own countries or to the state courts, where they have personal jurisdiction. The suggestion that, say, a New York state court would be biased in a dispute between an Argentinian and a Chilean seems rather far-fetched. Bias might be more likely in a suit between a New Yorker and the Argentinian, but the Federal courts are clearly open for the hearing of such a suit.

(c) The suggestion is particularly misconceived coming from the petitioner—as indeed it would from any citizen "five percent" assignee of an alien's claim. Under the device employed here, it appears that Kramer could have sued the respondent, a Haitian corporation, in a Texas state court. It is, we assume, not notorious that the Texas state courts are biased against their own citizens and in favor of Haitians, or that having procured the assignment of title to the claim here and a 5 percent interest in it, Kramer then needed to invoke the protection of the Federal courts in order to obviate the prejudice rampant in Wichita Falls, Texas, in favor of Haitians. The assignee-plaintiff seeking to create jurisdiction will, of course, always be a citizen suing an alien.

In summary, there is no reason either in the statutory language or as a matter of policy for treating devices to manufacture diversity jurisdiction any better when the jurisdictional bar being avoided is the bar against suits in the Federal courts by one alien against another as compared with that against a suit between citizens of the same state.

* * * * *

In a final extraordinary argument, petitioner suggests (Brief, pp. 52-53) that if the Court is of a mind to af-

firm the judgment below, "such a ruling be made prospective in effect so as to avoid hardship to this petitioner." In other words, the judgment of the Court of Appeals should be declared to be correct but nonetheless it should be reversed.

The technique of prospective judicial action has been, of course, applied in cases where established precedent is overruled, though even there only rarely. See, e.g., *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *DeStefano* v. *Woods*, 392 U.S. 631, 633 (1968); *Stovall* v. *Denno*, 388 U.S. 293 (1967).[11] Here the basic contention of petitioner is not that the old, established precedents—which we review at pages 14-18 above—should be followed, but that they should be departed from.[12] Petitioner contends not for a doctrine of prospective overruling but for one of prospective non-overruling; the only overruling—of this Court's established precedents—is to be on a one-way ticket issued to him alone.

Petitioner alleges that there has been no direct precedent under Section 1359 (that is, after the 1948 recodification) involving the matters here at stake. All this means

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[11] In *Linkletter*, retroactive effect was denied to *Mapp* v. *Ohio*, 367 U.S. 643 (1961), which had overruled *Wolf* v. *Colorado*, 338 U.S. 25 (1949). The *DeStefano* case teaches that the "retroactive—prospective" choice is one which is to be made with respect to a "case reversing prior doctrines in the area of the criminal law." See 392 U.S., at 633. The *Stovall* case indicates that the question arises with respect to the retrospective application of "rulings [which] were not foreshadowed in our cases." 388 U.S., at 299.

[12] While the action of the Third Circuit in *McSparran*, see n. 11, pp. 21-23, *supra*, was made prospective only (slip opinion, pp. 17-18), there the action of the court was one which overruled its earlier decision in the *Corabi* case. The decision to act prospectively only was taken on the basis that the court recognized "that many actions are now pending in the courts of this circuit in reliance on our earlier decisions." (slip opinion, p. 17) There is no comparable situation here.

is that litigants have not had the effrontery in recent years—since the 1948 recodification—to essay a scheme as patently beyond the pale of this Court's established decisions as this one here. Even petitioner thought it in his advantage not to be entirely candid about the Side Agreement until he was made to be.

It is also asserted, in support of this extraordinary request (Brief, p. 52), that "petitioner reasonably believed that he had a right to invoke Federal jurisdiction." No case suggests that the jurisdiction of the Federal courts depends upon the reasonableness of the plaintiff's belief in assuming that it existed. Moreover, the strength of petitioner's belief as to the existence of Federal court jurisdiction here on all of the facts was not quite robust enough to lead him to make an immediate and candid disclosure of the Side Agreement.

Forthwith after the Assignment and the Side Agreement, petitioner sought to maintain this action in Federal court. It is obvious that this choice was a conscious one. The Assignment was motivated by the desire to create Federal jurisdiction. Federal court jurisdiction was then asserted on a basis under which all the relevant facts were not candidly disclosed. While the petitioner's scheme for manufacturing Federal jurisdiction was upheld by the District Court, it was promptly and unanimously rejected by the Court of Appeals. No reason is suggested why the suit could not have been brought in the Texas state courts in the first place. The device used here to manufacture jurisdiction is one which has been condemned by a line of decisions in this Court ranging back for almost a century. Even assuming that this Court somehow had the power to do so, there is absolutely no reason to take the extraordinary step of holding that Federal jurisdiction should be granted to Kramer here simply *pro hac vice*.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.[12]

Respectfully submitted,

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January, 1969

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[12] Certiorari was granted in this case on a Petition which primarily recited a conflict with *Corabi* v. *Auto Racing, Inc.*, 264 F.2d 784 (3d Cir. 1959). (See Petition, pp. 7-9) Although decisions in other Courts of Appeals which have followed *Corabi* have not been overruled, *Corabi* itself has recently been overruled by the Circuit which produced it in the *McSparran* case, *supra*, n. 11, pp. 22-23. The present scheme is clearly beyond the pale and outside the mainstream of the presently controversial issues involving the deliberate creation of diversity jurisdiction, such as the issue whether *Corabi* or *McSparran* is the proper rule in cases involving court appointments of fiduciaries (see n. 11, p. 22 and n. 19, p. 28, *supra*), and this case is not an appropriate vehicle to shed any light on that controversy. This is underscored by the petitioner's belated attempt to restrict the principles for which he contends to alienage situations.

For these reasons, we respectfully suggest that the Court may wish to consider whether the Writ of Certiorari should be dismissed as improvidently granted.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 156

CLAYTON S. KRAMER,

Petitioner,

v.

CARIBBEAN MILLS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

A critical factor in this case is that the assignment and the collateral agreement are valid and enforceable under Texas law in particular and under the law generally in this country. The respondent has expressly conceded as much (Br., pp. 12, 26). Indeed, the respondent additionally acknowledges (Br., p. 26, fn. 16) that a judgment obtained in a state court premised upon such a valid assignment must be accorded full faith and credit under the Constitution. *Titus v. Wallick*, 306 U.S. 282, 289. Even the federal courts

admit the validity of this type of assignment. See *Globe Indemnity Co. v. Puget Sound Co.*, 149 F.2d 805, 809 (C.A. 2).

Where there is such a universality in the law respecting the validity of the type of assignment here involved, a federal court should not lightly assume or declare that the assignment is a "sham" or "colorable" or "improper or collusive" within the meaning of § 1359. An *Erie*-type respect for the state substantive law of assignments, a respect not demanded of federal courts in most of the pre-revision cases, cautions against an unlimited reading of the "improperly or collusively" language of § 1359. To read that language in the narrower sense suggested by Chief Judge Biggs in *Corabi v. Auto Racing, Inc.*, 264 F.2d 784, 788 (C.A. 3), is to permit such respect to be given without exposing the federal courts to the frauds upon their jurisdiction which Congress has long proscribed. The only collusive arrangements that Congress ever intended to prohibit are those that involve "frauds upon the court, and nothing more." *Williams v. Nottawa*, 104 U.S. 209, 211. As stated recently by two commentators (Lavine and Horning, *Manual of Federal Practice*, p. 63 (1967)):

> "Under 28 U.S.C. § 1359, an assignment of a cause of action to a resident of another state is effective for purposes of creating diversity jurisdiction *provided the assignment itself is valid under the applicable state law* and results in a genuine transfer of ownership. . . .
>
> "Where the assignment is real and not merely colorable, the fact that the motive for the assignment was to permit suit in federal court is immaterial." [Emphasis added.]

See also Comment, *Assignment Device in Diversity Cases*, 35 U. Cinc. L. Rev. 33 (1966).

That the assignment here was not only valid under applicable state law but resulted in a genuine transfer of ownership is evident from the following considerations:

(1) The assignment on its face divested Panama of "all of our right, title and interest, including all actions, causes of action, [and] claims" arising out of the tripartite agreement. App. 13. And the collateral agreement made clear that Kramer "is now the sole owner of any action or causes of action derivative" from the tripartite agreement, "with the independent right of management, control and prosecution thereof." App. 15. By virtue of applicable state law, which concededly validated these provisions, there was a complete divestiture of all of Panama's interest in the original agreement and any claims or causes of action arising therefrom. Following the assignment, Panama could not have brought suit against Caribbean Mills; nor could it have complained if Kramer had refused to institute or maintain a lawsuit on the assigned claim. Panama's only conceivable claim would be against Kramer if he were to refuse to pay the 95% bonus once it became due. In short, as the District Court found, the assignment "was good on its face" (App. 12) and thus effectuated a complete transfer of Panama's interests.

(2) The fact that the collateral agreement provided for a 95% "bonus" to Panama arising out of the net proceeds of any recovery by Kramer did not destroy the effectiveness or completeness of the assignment of all of Panama's interest in the tripartite agreement or in any cause of action thereunder. The collateral agreement merely confirmed that transfer and made it clear that Panama had no control whatever in respect to any lawsuit Kramer might institute. The so-called "bonus," which was actually part of the consideration for the assignment, at the least could be construed as making Kramer an assignee for collection. But such an assignment is not illegal or improper or compromised in any sense. As was said by Judge Charles E. Clark in *Rosenblum v. Dingfelder*, 111 F.2d 406, 407 (C.A. 2):

> "In modern times the assignment of choses in action has come to be thoroughly recognized, and the 'real party in interest' provision of present-day codes—repeated in Rule 17(a)—has been generally

> construed to include an assignee for collection or suit only . . . . Since the claim is owned and may be sued upon by some one, all a defendant may properly ask is such a party plaintiff as will render the judgment final and res judicata of the right sued upon."

Thus an assignee for collection, as distinguished from an agent for collection, is a "real party in interest" within the scope of Rule 17(a) of the Federal Rules of Civil Procedure. See 3A *Moore's Federal Practice*, par. 17.09 [1.-1] (1967). The collection aspects do not reflect upon the bona fides or the completeness of the assignment itself. Here, as in *Paper Makers Importing Co. v. City of Milwaukee*, 165 F. Supp. 491, 501 (E.D. Wis.),

> "The assignment was a complete and irrevocable transfer. It cannot be said that the plaintiffs are mere nominal parties, collusively lending the use of their names to create a case cognizable in the federal district court or that they as plaintiffs occupy a spurious status created by sham, pretense or other fiction."

(3) The completeness of the transfer of Panama's interests was confirmed by both the trial court and the jury. The trial judge had before her all of the testimony and documentary evidence concerning the assignment and the collateral agreement and concluded, from that record, that complete title had passed to Kramer and that the assignment was not conclusively made in order to invoke the jurisdiction of the court. App. 12. That determination is entitled to decisive weight if, as here, it is supported by substantial evidence. It was a determination made "upon facts sufficiently proven, and controlled by fixed rules of law," facts that were "made distinctly to appear on the record." *Barry v. Edmunds*, 116 U.S. 550, 566, 559.

The jury, moreover, found from the evidence before it that Panama "assigned all of its interest . . . under the May 30, 1959 Agreement to Clayton Kramer." Special Issue No. 2, App. 78. It further found that the amount of Panama's

interest thus assigned was $165,000, the total amount payable under the tripartite agreement. Special Issue No. 2-a, App. 78.

The respondent seeks to avoid the impact of these findings by asserting (Br., pp. 7-8, fn. 8) that the findings relate only to Kramer's legal title to the claim, an element of his substantive case.[1] But these determinations as to legal title also are relevant to the critical conclusions to be drawn as to the bona fides and the completeness of the assignment itself. Petitioner misspoke in his main brief to this Court (p. 51) in indicating that the jury had before it the evidence as to the collateral agreement.[2] But the jury determination that all of the interests of Panama were assigned to Kramer, not being inconsistent with the testimony as to the collateral agreement or the trial court's determination as to the non-collusive nature of the assignment, have probative value both as a matter of proof of the substantive claim and as a matter of proof of an assignment complete in nature.

(4) Th facts showing that Panama was divested of all its interests in this claim and that Panama had no control whatever over the management of the lawsuit serve to distinguish this case from those pre-revision cases relied upon by the Fifth Circuit and by the respondent where collusive transfers were found. In each of those cases, there was either an incomplete transfer of interest or a retention by the assignor of control or management of the lawsuit.

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[1]The trial court charged the jury, R. 514, that Kramer "also has the burden of establishing by a preponderance of the evidence, that Panama and Venezuela Finance Company acquired Roy Kelly's rights under the agreement and that Panama and Venezuela Finance Company assigned its rights under the agreement and Roy Kelly's rights under the agreement to him."

[2]That evidence was heard and considered by the trial judge outside the presence of the jury. App. 33. The respondent objected to that procedure and asked that the questioning take place in the presence of the jury. App. 33.

Thus in *Williams v. Nottawa*, 104 U.S. 209, the transferee conceded that he had received and held the bonds in question solely for collection, title to the bonds remaining in the transferors. In *Southern Realty Investment Co. v. Walker*, 211 U.S. 603, a sham corporation was created in South Dakota by certain lawyers solely to lend its name and citizenship to Georgia citizens who might want to sue other Georgia citizens in federal courts; no real transfer of interests was ever contemplated. The land transfer in *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, was not only lacking in consideration but took place between two corporations having identical stockholders, so that the deed amounted to nothing more than a transfer of property among those same stockholders. Almost precisely the same situation was present in *Miller & Lux, Inc. v. East Side Canal & Irr. Co.*, 211 U.S. 293. See also *Lake County Commissioners v. Dudley*, 173 U.S. 243, where there was only an "apparent" transfer of bond coupons, the transferee not even knowing of the transactions in question until nine years later.

The arrangement held collusive in *Cashman v. Amador & Sacramento Canal Co.*, 118 U.S. 58, was one where the plaintiff in an injunction suit was a mere dummy, having no interest in the lawsuit and having surrendered all control of the progress and prosecution of the suit to one who was not otherwise enabled to sue in federal court. So too in *Farmington Village v. Pillsbury*, 114 U.S. 138, the transfer of coupons was arranged so that it became clear that the transferors "intended to keep the control of the whole matter in their own hands," there being no valid instrument divorcing the transferors from all control over the collection. And in *Little v. Giles*, 118 U.S. 596, the transferors (Wheeler and Burr) agreed to prosecute the suit at the expense of the transferee (Giles) and to render all necessary legal assistance for such purpose, Giles agreeing to pay all expenses and to pay to Wheeler and Burr one-third of the value of the lands recovered in the suit.

In this case, the concededly valid assignment and collateral agreement preclude any assumption or determination

that Panama retained any interest whatever in this claim or any control over the lawsuit. Those documents are not illegal or collusive on their face, and no evidence has been adduced to show that the transfer of Panama's interests was any less complete and effective than therein stated.

All that remains in this case, therefore, is the conceded motive of creating the basis for invoking federal diversity jurisdiction, a motive which is demonstrably irrelevant to the determination of what is collusive or improper under § 1359. If the assignment be valid and complete, "it makes no difference that by such transaction the transferee acquired the advantage of suing in the federal court." *Cross v. Allen*, 141 U.S. 528, 533.[3] That motive, standing alone, cannot do service as a substitute for the "collusive" requirement of § 1359—a concept that "embraces either a fictitious or assumed state of facts in order to obtain a judicial determination or an actual existence of issues which have been corruptly arranged beforehand in order to obtain the court's determination." *Curb and Gutter Dist. No. 37 v. Parrish*, 110 F.2d 902, 907 (C.A. 8).

A few final words need be said about the respondent's suggestion (Br., p. 9, fn. 10; p. 42, fn. 13) that the writ of certiorari might be dismissed as improvidently granted in light of the overruling by the Third Circuit of its *Corabi* decision, a decision alleged by petitioner to be in conflict with the decision below (Petition, p. 7). In the first place, that conflict—which was vigorously disputed by respondent (Opp. Br., p. 11)—was not the sole conflict or the sole reason asserted why certiorari should issue. The Petition (p. 9) also alleged conflicts with decisions of the Eighth and Tenth Circuits. And more importantly, and quite apart from the alleged conflicts, the Petition (p. 10) claimed that the decision below raised significant and recurring problems

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[3] "It is not collusive to desire or prefer that action be brought in the federal court and to plan to that end without fictions or deception, provided that the plaintiff who sues has a legal right to sue." 1 *Cyclopedia of Federal Procedure*, p. 525 (3d ed., 1966).

concerning efforts to invoke and create federal diversity jurisdiction that deserved attention by this Court. The grant of certiorari may well have reflected a recognition of those important questions that have long plagued lower federal courts.

In addition, the termination of a conflict that becomes known subsequent to the grant of certiorari does not necessarily justify dismissal of the writ. There are instances where, upon closer examination, the Court has concluded that there is in fact no conflict of decisions and has thereupon dismissed the writ.[4] More frequently, the Court has simply distinguished the allegedly conflicting decision in its opinion on the merits, especially where the matter is otherwise important.[5] Of direct relevance, however, is the Court's recent action in *Switzerland Cheese Assn. v. Horne's Market*, 385 U.S. 23, 24, fn. 2, where the Court merely noted that the conflict giving rise to the grant of certiorari had disappeared subsequent to the grant by virtue of an *en banc* reversal of position by the court rendering the conflicting decision. The Court then proceeded ro resolve the merits of the case.

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[4] *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-393; *Sanchez v. Borras*, 283 U.S. 798.

[5] *Barber v. Barber*, 323 U.S. 77, 79-80; *United States v. Standard Rice Co.*, 323 U.S. 106.

CONCLUSION

For the reasons expressed in this brief, supplementing those previously expressed in petitioner's main brief, the judgment below should be reversed.

Respectfully submitted,

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January, 1969

SUPREME COURT OF THE UNITED STATES

No. 156.—October Term, 1968.

Clayton S. Kramer, Petitioner, v. Caribbean Mills, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 5, 1969.]

Mr. Justice Harlan delivered the opinion of the Court.

The sole question presented by this case is whether the Federal District Court in which it was brought had jurisdiction over the cause, or whether that court was deprived of jurisdiction by 28 U. S. C. § 1359. That section provides:

> "A district court shall not have jurisdiction over a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

The facts were these. Respondent Caribbean Mills, Inc. ("Caribbean") is a Haitian corporation. In May 1959 it entered into a contract with an individual named Kelly and the Panama and Venezuela Finance Company ("Panama"), a Panamanian corporation. The agreement provided that Caribbean would purchase from Panama 125 shares of corporate stock, in return for payment of $85,000 down and an additional $165,000 in 12 annual installments.

No installment payments ever were made, despite requests for payment by Panama. In 1964, Panama assigned its entire interest in the 1959 contract to petitioner Kramer, an attorney in Wichita Falls, Texas. The stated consideration was $1. By a separate agree-

ment dated the same day, Kramer promised to pay back to Panama 95% of any net recovery on the assigned cause of action,[1] "solely as a Bonus."

Kramer soon thereafter brought suit against Caribbean for $165,000 in the United States District Court for the Northern District of Texas, alleging diversity of citizenship between himself and Caribbean.[2] The District Court denied Caribbean's motion to dismiss for want of jurisdiction. The case proceeded to trial, and a jury returned a $165,000 verdict in favor of Kramer.

On appeal, the Court of Appeals for the Fifth Circuit reversed, holding that the assignment was "improperly or collusively made" within the meaning of 28 U. S. C. § 1359, and that in consequence the District Court lacked jurisdiction. We granted certiorari, 393 U. S. 819 (1968). For reasons which follow, we affirm the judgment of the Court of Appeals.

I.

The issue before us is whether Kramer was "improperly or collusively made" a party "to invoke the jurisdiction" of the District Court, within the meaning of 28 U. S. C. § 1359. We look first to the legislative background.

Section 1359 has existed in its present form only since the 1948 revision of the Judicial Code. Prior to that time, the use of devices to create diversity was regulated by two federal statutes. The first, known as the

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[1] That is, Kramer would receive 5%, and Panama 95%, of the net proceeds remaining after payment of attorneys' fees and expenses of litigation.

[2] Title 28 U. S. C. § 1332 (a)(2) grants district courts original jurisdiction of civil actions in which the matter in controversy exceeds $10,000 and is between "citizens of a State, and foreign states or citizens or subjects thereof . . . ." The District Court would have had no jurisdiction of a suit brought by Panama against Caribbean, since both were alien corporations.

"assignee clause,"[3] provided that, with certain exceptions not here relevant:

> "No district court shall have cognizance of any suit . . . to recover upon any promissory note or other chose in action in favor of any assignee, . . . unless such suit might have been prosecuted in such court . . . if no assignment had been made."

The second pre-1948 statute, 28 U. S. C. § 80,[4] stated that a district court should dismiss an action whenever:

> "it shall appear to the satisfaction of the . . . court . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of [the] court, or that the parties to said suit have been improperly or collusively made or joined . . . for the purpose of creating [federal jurisdiction]."

As part of the 1948 revision, § 80 was amended to produce the present § 1359. The assignee clause was simultaneously repealed. The Reviser's Note describes the amended assignee clause as a "'jumble of legislative jargon,'"[5] and states that "the revised section changes the clause by confining its application to cases wherein the assignment is improperly or collusively made. Furthermore, . . . the original purpose of [the assignee] clause is better served by substantially following section 80." That purpose was said to be "to prevent the manufacture of Federal jurisdiction by the device of assignment." *Ibid.*

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[3] The clause first appeared as § 11 of the Judiciary Act of 1789, 1 Stat. 79.

[4] This statute was first enacted in 1875. See 18 Stat. 470.

[5] The quotation is from a Note, Chaos of Jurisdiction in the Federal District Courts, 35 Ill. L. Rev. 566, 569 (1941); it refers primarily to the obscure wording of certain exceptions contained in the clause. See *id.*, at 569–571.

II.

Only a small number of cases decided under § 1359 have involved diversity jurisdiction based on assignments,[6] and this Court has not considered the matter since the 1948 revision. Because the approach of the former assignee clause was to forbid the grounding of jurisdiction upon *any* assignment, regardless of its circumstances or purpose,[7] decisions under that clause are of little assistance. However, decisions of this Court under the other predecessor statute, 28 U. S. C. § 80, seem squarely in point. These decisions, together with the evident purpose of § 1359, lead us to conclude that the Court of Appeals was correct in finding that the assignment in question was "improperly or collusively made."

The most compelling precedent is *Farmington* v. *Pillsbury*, 114 U. S. 138 (1885). There Maine holders of bonds issued by a Maine village desired to test the bonds' validity in the federal courts. In an effort to accomplish this, they cut the coupons from their bonds and transferred them to a citizen of Massachusetts, who gave in return a non-negotiable two-year note for $500 and a promise to pay back 50% of the net amount recovered above $500. The jurisdictional question was certified to this Court, which held that there was no federal jurisdiction because the plaintiff had been "improperly or collusively" made a party within the meaning of the predecessor statute to 28 U. S. C. § 80. The Court pointed out that the plaintiff could easily have been released from his non-negotiable note, and found that apart from the hoped-for creation of federal jurisdiction the only real consequence of the transfer was to enable

[6] See cases cited in J. Moore, Federal Practice ¶ 17.05[3–1], nn. 7–9 (2d ed. 1968).

[7] There were exceptions for particular types of assignments, none of which is relevant here.

the Massachusetts plaintiff to "retain one-half of what he collects for the use of his name and his trouble in collecting." 114 U. S., at 146. The Court concluded that "the transfer of the coupons was 'a mere contrivance, a pretence, the result of a collusive arrangement to create' " federal jurisdiction. *Ibid.*

We find the case before us indistinguishable from *Farmington* and other decisions of like tenor.[8] When the assignment to Kramer is considered together with his total lack of previous connection with the matter and his simultaneous reassignment of a 95% interest back to Panama, there can be little doubt that the assignment was for purposes of collection, with Kramer to retain 5% of the net proceeds "for the use of his name and his trouble in collecting."[9] If the suit had been

[8] See, *e. g.*, *Williams* v. *Nottawa*, 104 U. S. 209 (1881); *Little* v. *Giles*, 118 U. S. 596 (1886).

[9] Hence, we have no occasion to re-examine the cases in which this Court has held that where the transfer of a claim is absolute, with the transferor retaining no interest in the subject matter, then the transfer is not "improperly or collusively made," regardless of the transferor's motive. See, *e. g.*, *Cross* v. *Allen*, 141 U. S. 528 (1891); *South Dakota* v. *North Carolina*, 192 U. S. 286 (1904); *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518 (1928); cf. *Williams* v. *Osenton*, 232 U. S. 619 (1914).

Nor is it necessary to consider whether, in cases in which suit is required to be brought by an administrator or guardian, a motive to create diversity jurisdiction renders the appointment of an out-of-state representative "improper" or "collusive." See, *e. g.*, *McSparran* v. *Weist*, 402 F. 2d 867 (1968); *Lang* v. *Elm City Constr. Co.*, 324 F. 2d 235 (1963); *County of Todd* v. *Loegering*, 297 F. 2d 470 (1961); cf. *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U. S. 183 (1931). Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court; (2) under state law, different kinds of guardians and administrators may possess discrete sorts of powers; and (3) all such representatives owe their appointment to the

unsuccessful, Kramer would have been out only $1, plus costs. Moreover, Kramer candidly admits that "the assignment was in substantial part motivated by a desire by [Panama's] counsel to make diversity jurisdiction available . . . ." [10]

The conclusion that this assignment was "improperly or collusively made" within the meaning of § 1359 is supported not only by precedent but by consideration of the statute's purpose. If federal jurisdiction could be created by assignments of this kind, which are easy to arrange and involve few disadvantages for the assignor, then a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties. Such "manufacture of Federal jurisdiction" was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors.

III.

Kramer nevertheless argues that the assignment to him was not "improperly or collusively made" within the meaning of § 1359, for two main reasons. First, he suggests that the undisputed legality of the assignment under Texas law necessarily rendered it valid for purposes of federal jurisdiction. We cannot accept this contention. The existence of federal jurisdiction is a matter of federal, not state, law. See, *e. g.*, *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 582 (1896). Nothing in the language or legislative history of § 1359 suggests that an assignment cannot be "improperly or collusively made" even though binding under state law, and this Court several times has held to the contrary under former

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decree of a state court, rather than solely to an action of the parties. It is not necessary to decide whether these distinctions amount to a difference for purposes of § 1359.

[10] Brief for Petitioner 16.

28 U. S. C. § 80.[11] Moreover, to accept this argument would render § 1359 largely incapable of accomplishing its purpose; this very case demonstrates the ease with which a party may "manufacture" federal jurisdiction by an assignment which meets the requirements of state law.

Second, Kramer urges that this case is significantly distinguishable from earlier decisions because it involves diversity jurisdiction under 28 U. S. C. § 1332 (a)(2), arising from the alienage of one of the parties, rather than the more common diversity jurisdiction based upon the parties' residence in different States. We can perceive no substance in this argument: by its terms, § 1359 applies equally to both types of diversity jurisdiction, and there is no indication that Congress intended them to be treated differently.

IV.

In short, we find that this assignment not only falls within the scope of § 1359 but within its very core. It follows that the District Court lacked jurisdiction to hear this action, and that petitioner must seek his remedy in the state courts.[12] The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

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[11] See, *e. g., Little* v. *Giles*, 118 U. S. 596, 602 (1886); *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 336 (1895); cf. *Smith* v. *Kernochen*, 7 How. 198, 215–216 (1849).

[12] Petitioner asks that we make our ruling prospective only, asserting that he reasonably believed he had a right to invoke federal jurisdiction, and that the four-year Texas statute of limitations governing contract actions, Tex. Rev. Civ. Stat., Art. 5527 (1841), may bar him from recovering in the state courts as to some of the installments allegedly due him. However, another Texas statute, Tex. Rev. Civ. Stat., Art. 5539a (1931), provides:

"When . . . a judgment . . . shall be set aside or annulled in a direct proceeding, because of a want of jurisdiction of the Trial

[Footnote 12 continued.]

Court, . . . and within sixty (60) days after such dismissal . . . becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement in the second Court shall not be counted as a part of the period of limitation unless the opposite party shall . . . show the first filing to have been in intentional disregard of jurisdiction."

This statute has been held to apply when the dismissal on jurisdictional grounds was by a federal court. See, *e. g.*, *Burford* v. *Sun Oil Co.*, 186 S. W. 2d 306 (1945). Petitioner alleges that the first contract installment accrued on July 1, 1962. Hence, Art. 5539a appears to assure him a full state-court remedy, and thus obviates the need for further discussion of prospectivity.